Supreme Court, U.S.
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No. 15–415

In the Supreme Court of the United States

ENCINO MOTORCARS, LLC,
PETITIONER

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, AND REUBEN CASTRO,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

Under *Chevron*'s two-step framework:

1. Does the Fair Labor Standards Act's statutory overtime-pay exemption for automobile dealership "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles," 29 U.S.C. § 213(b)(10)(A), unambiguously apply or not apply to service advisors?

2. Is the Department of Labor's 2011 notice-and-comment regulation, 29 C.F.R. § 779.372(c), which concluded that service advisors fall outside the salesman/partsman/mechanic exemption, a permissible construction of the statute?

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INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA) guarantees nonexempt employees time-and-a-half pay for hours worked beyond forty per week. 29 U.S.C. § 207(a)(1). From 1961 to 1966, all automobile dealership employees were exempt from overtime pay. In 1966, Congress repealed this blanket exemption and replaced it with one limited to three enumerated types of employees: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A).

Exercising its delegated rulemaking authority, in 2011 the Department of Labor (DoL) promulgated a notice-and-comment regulation providing that a fourth type of dealership employee, service advisors, does not qualify for the exemption. 29 C.F.R. § 779.372(c). After considering each comment it received, DoL noted that salesmen sell automobiles, while partsmen and mechanics service automobiles. Service advisors do not "sell[] or servic[e] automobiles, trucks, or farm implements." They write up repair estimates and work orders *before* the servicing begins.

Petitioner seeks to shoehorn service advisors into the contrived, nonexistent category of "salesmen primarily engaged in servicing automobiles." Br. 22, 37. To do so, petitioner stretches the statutory term "servicing" beyond automotive manual labor to employees who are "integral to the servicing process," whatever that means. Br. 1, 30; *accord id.* at 13, 23, 25, 27. Petitioner offers its textual analysis with hardly a dictionary definition (at 26), its supposed "fundamental rule of grammar" (at 24) with

nary a grammatical authority, and its administrative-law argument with only passing reference (at 36–37) to *Chevron*. But dictionaries, grammarians, interpretive canons, an opinion of this Court by Chief Justice John Marshall, computer searches of millions of books, and administrative-law authorities are all to the contrary, not to mention more than a hundred analogously worded statutes that are appended to this brief. DoL's notice-and-comment regulation is not only permissible at *Chevron* step two, but unambiguously required by the statute at *Chevron* step one.

STATEMENT

A. Statutory and Regulatory Background

1. *The FLSA's Overtime-Pay Requirement and Its Specific Exemptions.* The FLSA promotes a "'general maximum working week'" and combats "the evil of 'overwork' as well as 'underpay.'" *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 578 (1942) (quoting President Franklin Roosevelt). Thus, the statute requires employers to pay time-and-a-half for hours worked beyond forty per week, except to exempt employees. 29 U.S.C. § 207(a)(1); *see also id.* §§ 207, 213.

2. *The 1961 Blanket Dealership Exemption.* In 1961, Congress enacted a blanket exemption from the FLSA's minimum-wage and overtime provisions for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 73 (codified at 29 U.S.C. § 213(a)(19) (1964)). Thus, from 1961 to 1966, all automobile dealership employees were exempt from

the overtime-pay requirement, whether they were salesmen, receptionists, managers, mechanics, partsmen, accountants, service advisors, dispatchers, lot boys, parts runners, car washers, or janitors.

3. *The 1966 Salesmen/Partsmen/Mechanics Exemption.* In 1966, Congress repealed the blanket dealership exemption from the minimum wage and narrowed it as to overtime pay. The Senate's floor discussion focused on the need for three specific types of employees—salesmen, partsmen, and mechanics—to work long and unpredictable hours (and for some to travel off-site). Senators emphasized that salesmen sold automobiles outside business hours, mechanics traveled for rural service calls, and farm-implement partsmen (the partsmen who were the focus of the congressional debate) had to respond to emergency calls for parts around the clock. 112 CONG. REC. 20,502–04 (Aug. 24, 1966) (Sens. Bayh, Hruska, Mansfield, and Yarborough).

The 1966 statute thus exempted only those three types of dealership employees: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836, *reprinted in* App., *infra*, at A1. The statute expressly authorized DoL to promulgate implementing regulations. *Id.* § 602, 80 Stat. at 844, *reprinted in* App., *infra*, at A2.

4. *DoL's 1970 Ruling That Service Advisors Are Not Exempt.* In 1970, DoL issued an interpretive rule clarifying that service advisors do not fall within the salesman/partsman/mechanic exemption. 35 Fed.

Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). Because it treated the 1970 rule as interpretive, DoL did not employ notice-and-comment rulemaking procedures. *Id.* at 5856. The rule explained that service advisors' main tasks of diagnosing automobiles' repair needs, writing up work orders, and assigning mechanics work did not make them exempt. *Id.* at 5896. Thus, service advisors are not exempt as salesmen, because "a salesman" must be "employed for the purpose of and *primarily engaged in making sales* or obtaining orders or contracts for sale *of the vehicles or farm implements*" sold by the dealership. *Id.* (codified at 29 C.F.R. § 779.372(c)(1) (1971)) (emphases added).

This rule remained in place until DoL repromulgated it as a notice-and-comment regulation in 2011.

5. *The 1974 Re-Enactment of the Exemption.* In 1974, Congress re-enacted the dealership exemption, without any changes affecting automobile dealerships. The amendment added a separate exemption for boat salesmen and removed exemptions for trailer partsmen and mechanics as well as aircraft partsmen and mechanics. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 65. As codified, the statute is reprinted in Pet. App. 39 and Pet. Br. App. 6a–7a. Like the 1966 Act, the 1974 statute expressly authorized DoL to promulgate implementing regulations. *Id.* § 29(b), 88 Stat. at 76, *reprinted in* App., *infra*, at A2.

6. *A Period of Non-Enforcement.* In 1973, long before *Chevron*, the Fifth Circuit refused to defer to DoL's interpretive rule. Even though it found the statute "not entirely clear," it held that service

advisors were exempt from overtime because they were "functionally similar" to partsmen and mechanics. *Brennan* v. *Deel Motors, Inc.*, 475 F.2d 1095, 1097–98 (5th Cir. 1973). In response to this and three district court decisions, DoL issued an opinion letter and added an insert to its operations handbook noting that it would treat service advisors as exempt. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter No. WH-467, 1978 WL 51403 (July 28, 1978); U.S. DEP'T OF LABOR, WAGE & HOUR DIV., INSERT NO. 1757, FIELD OPERATIONS HANDBOOK 24L04–4(k) (1987), https://perma.cc/5ghd-kcjj, at 35.

Neither of these enforcement documents offered any reasoning apart from mentioning the lower court decisions. The Field Operations Handbook noted that officially changing the agency's position to exempt service advisors would require revising the 1970 rule, *id.*, but DoL took no formal action to change its position.

7. *DoL's 2008 Notice of Proposed Rulemaking.* In 2008, DoL issued a notice of proposed rulemaking to eliminate inconsistency between its 1970 rule and its informal enforcement materials. It stated that it was considering revising 29 C.F.R. § 779.372(c)(1) and (c)(4) to exempt service advisors. 73 Fed. Reg. 43,654, 43,658–59, 43,671 (July 28, 2008), *reprinted in* App., *infra*, at B1–B3.

Five of the seven relevant comments opposed the proposed change because it would contravene the FLSA's text, legislative history, and congressional intent. *See, e.g.*, George Miller (Chairman, House Committee on Education & Labor) et al., Comment Letter on Proposed Rule to Update Regulations

Issued Under the FLSA (Sept. 26–27, 2008), at 7–8, http://tinyurl.com/gu4f7ne.

8. *DoL's 2011 Notice-and-Comment Regulation.* In 2011, after reviewing and analyzing the comments it received, DoL declined to broaden the statutory exemption to include service advisors. It explained that only "salesmen who sell vehicles and partsmen and mechanics who service vehicles" should be exempt, not service advisors, who "merely coordinate between customers and the mechanics who actually perform the services." 76 Fed. Reg. 18,832, 18,838 (Apr. 5, 2011), *reprinted in* App., *infra*, at C1–C6.

Thus, after notice and comment, DoL "concluded that current [29 C.F.R. §] 779.372(c) sets forth the appropriate approach to determining whether [service advisors] are subject to the exemption." *Id.* It rejected the proposed § 779.372(c)(4), which would have reversed DoL's official position. In essence, the agency repromulgated its original interpretation as a notice-and-comment regulation. The final regulation is reprinted in Pet. Br. App. 27a–28a and Pet. App. 60–61.

B. Facts and Procedural History

1. *Facts.* Respondents work (or worked) as service advisors for petitioner, a Mercedes-Benz automobile dealership in the Los Angeles area. J.A. 38–40. Their job was to "meet and greet" customers, "accept cars for service," suggest that "certain services be conducted" based on "complaints given [to] them by the[] vehicle owners," and suggest "supplemental service." J.A. 39–40. After communicating with customers, they "wr[o]te up an estimate for the repairs and services." J.A. 40. Porters then took automobiles

back "to the mechanics . . . for repair and maintenance." *Id.*

During the dealership's regular business hours, the service advisors "[we]re required to remain at their service posts" in the dealership's service department. J.A. 39. The dealership required them to work from 7 a.m. to 6 p.m. at least five days per week, totaling a weekly minimum of fifty-five hours. J.A. 39. The employees were paid on commission and received no overtime for hours in excess of forty per week. J.A. 40–41.

2. *The District Court's Dismissal.* In 2012, respondents filed suit in federal district court, alleging various violations of the FLSA and state law. Count One, at issue here, alleged that petitioner violated the FLSA by failing to pay them time-and-a-half for hours worked beyond forty per week. J.A. 42–44. Petitioner moved to dismiss, arguing that service advisors are exempt from the FLSA's overtime protections under § 213(b)(10)(A).

The district court acknowledged that "the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors." Pet. App. 27. But, viewing DoL's 2011 notice-and-comment regulation as "mere[ly] interpret[ive]" rather than legislative, the court "accorded [it] lower deference." Pet. App. 29. Embracing *Deel Motors*'s reasoning that service advisors are "functionally equivalent to salesmen and mechanics," the district court rejected DoL's regulation as "unreasonable." Pet. App. 29 (citing 475 F.2d at 1097–98). After dismissing respondents' other FLSA claims, the court declined to exercise supplemental jurisdiction over the remaining state-law claims. Pet. App. 29–31.

3. *The Court of Appeals' Reversal.* The court of appeals reversed the dismissal of the FLSA overtime claim. The court observed that "[petitioner] concede[d] that [respondents] do not meet the regulatory definitions" of salesmen, partsmen, or mechanics. Pet. App. 5. Because DoL had reaffirmed its position in 2011 after notice-and-comment rulemaking, the court of appeals evaluated the regulation under *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 10–11.

At *Chevron* step one, the court rejected petitioner's argument that the statute unambiguously exempts service advisors as salesmen who supposedly service automobiles. Pet. App. 6–8. The court adverted briefly to this Court's canon of construing FLSA exemptions narrowly. Pet. App. 6 & n.3, 8, 11.

At *Chevron* step two, the court found DoL's interpretation of the statute reasonable and therefore entitled to deference. The noun "salesman," it noted, relates directly to the gerund "selling," but not to "servicing." Pet. App. 13–15. The court declined to follow lower court decisions predating the 2011 notice-and-comment regulation, which had no reason to address, and had not addressed, the reasonableness of the 2011 regulation under *Chevron*. Pet. App. 11–12.

The court of appeals thus unanimously reversed the dismissal of the FLSA overtime claim and supplemental state-law claims and remanded for further proceedings. Pet. App. 19. Petitioner filed a petition for rehearing en banc, but no judge requested a vote on it. Pet. App. 20.

SUMMARY OF ARGUMENT

The salesman/partsman/mechanic exemption exempts salesmen who sell automobiles and partsmen and mechanics who service automobiles, not service advisors who may sometimes sell services. DoL's notice-and-comment regulation reflects the statute's clear meaning at *Chevron* step one; at the very least, it is a permissible reading at *Chevron* step two.

I.A. By its terms, § 213(b)(10)(A) does not exempt service advisors, because they neither sell automobiles nor service them. The exemption enumerates only three items that exempt salesmen sell: "automobiles, trucks, or farm implements." Salesmen who sell *services* are not exempt. Congress's discussion of salesmen concerned only automobile, truck, or farm-implement salesmen. Petitioner concedes that service advisors do not sell any of these.

Since the statute omits "services" as an object of "selling," petitioner seeks to shoehorn "selling services" into "servicing automobiles." But dictionaries and other U.S. Code provisions define "servicing" and "to service" to mean automotive maintenance, repair, and similar manual labor, not "selling" or clerical tasks such as writing up work orders and estimates. Petitioner seeks to expand "servicing automobiles" into "the process of servicing." But Congress did not use the word "process," and adding that elastic word would go a long way toward re-enacting the 1961 blanket exemption that Congress repealed.

B. The exemption's sentence structure confirms that service advisors fall outside it. As the words' shared etymology indicates, a *sales*man's job is *sell*ing things, not servicing them. Computer searches

of millions of books return hardly any references to salesmen servicing automobiles or similar machines.

The distributive canon *reddendo singula singulis* buttresses the inference that "salesman" goes with "selling," while "partsman" and "mechanic" go with "servicing." More than a hundred federal statutes use this type of distributive (as opposed to collective) phrasing. Often, as here, the first noun pairs with the first verb and the last noun(s) with the last verb(s). Statutes reflect that pattern regardless of whether, as here, there are more nouns than verbs.

Petitioner's only response is to posit a "default grammatical rule" that calls for reading statutes collectively, relating all nouns to all verbs. Pet. Br. 32. But Chief Justice Marshall, Scalia & Garner, Fowler's, and Strunk & White are all to the contrary. And petitioner must concede this statute is phrased at least in part distributively. Otherwise, applying petitioner's own rule consistently would create a nonexistent class of "mechanics primarily engaged in selling . . . automobiles." But a mechanic who primarily sells automobiles is a salesman, not a mechanic. So too, by definition, a salesman cannot primarily service automobiles, or else he would be a mechanic or partsman, not a salesman.

Petitioner's argument hangs largely on its repeated use of ellipses, to define a type of "salesm[e]n . . . primarily engaged in . . . servicing automobiles." If the statute read that way, with no omitted words, a court might have to struggle to find some type of employees who would fit. But, as the exemption actually reads, "salesman" comfortably fits the omitted

gerund "selling," just as the omitted nouns "partsman, or mechanic" fit "servicing."

C. Congress's 1974 amendments to § 213(b)(10) confirm the statute's distributive meaning. The House floor manager's summary of the final bill explained that salesmen had to be "primarily engaged in selling automobiles." Congress also added a new subsection (B) that paired "salesman" only with "selling," confirming that the two go together.

D. The statute's express exemption of "partsm[e]n" does not open the door to service advisors as well. Congress added partsmen to the exemption primarily because farm-implement partsmen play crucial roles helping mechanics during harvest season. Partsmen, unlike service advisors, have often worked as a mechanic's right-hand man or woman by grinding down parts, measuring parts with specialized tools, identifying precise parts needed for particular jobs, and handing parts over a counter to mechanics. They work in the back, by the mechanics' shop, and wear uniforms suitable for getting their hands dirty.

E. Congress listed three and only three types of dealership employees because they often had to work irregular hours, often off-site, making it hard to track hours and standardize pay. Service advisors, by contrast, work fixed shifts on-site.

F. If there were any lingering doubt, this Court's canon of construing FLSA exemptions narrowly precludes petitioner's expansive interpretation. That canon was a well-settled background rule when Congress passed the 1966 and 1974 amendments, as referred to by the House floor manager.

II.A. Even if there were any ambiguity, DoL's 2011 notice-and-comment regulation is a reasonable interpretation of the statute. Since the 1966 and 1974 FLSA Amendments expressly authorized DoL to issue implementing regulations, and DoL followed notice-and-comment procedures, *Chevron*'s framework governs.

B. In explaining its new regulation, DoL reasonably addressed comments raising the same arguments that petitioner now raises, including the industry's claims of reliance on two enforcement documents.

C. DoL's period of nonenforcement, in the face of several lower-court cases, did not change its longstanding 1970 regulation. Even if it had, agencies are free to change course. There is nothing "retroactive" about applying a 2011 notice-and-comment regulation to post-2011 conduct.

D. Dealerships cannot avoid paying service advisors overtime simply by paying them on commission. The exemption says nothing about commission-based pay, and mechanics and partsmen often are not paid commissions. Indeed, Congress provided a different exemption for commissioned sales employees, with certain safeguards. Petitioner's argument by analogy would undermine those safeguards.

ARGUMENT

DoL promulgated the FLSA notice-and-comment regulation at issue here pursuant to express statutory delegations of authority. Thus, *Chevron* governs the validity of the regulatory interpretation of § 213(b)(10)(A). Under that framework, unless "[1] Congress has directly spoken to the precise

question at issue. . . . [2] the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 842–43.

Here, at *Chevron* step one, Congress has unambiguously excluded service advisors from the salesman/partsman/mechanic exemption. Even if there were any ambiguity at step one, DoL's notice-and-comment regulation would be a reasonable interpretation of the statute at *Chevron* step two.

I. AT *CHEVRON* STEP ONE, THE FLSA'S OVERTIME EXEMPTION FOR AUTOMOBILE DEALERSHIP SALESMEN, PARTSMEN, AND MECHANICS DOES NOT EXEMPT SERVICE ADVISORS

When Congress repealed the 1961 overtime exemption for all dealership employees, it limited the exemption to only three enumerated types of dealership employees ("salesman, partsman, or mechanic") primarily engaged in two particular activities ("selling or servicing") on three types of machinery ("automobiles, trucks, or farm implements"). 29 U.S.C. § 213(b)(10)(A). As DoL recognized in promulgating its 2011 notice-and-comment regulation, this language naturally covers "salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838, *reprinted in* App., *infra*, at C6.

Service advisors fall outside the exemption because they neither sell vehicles nor service vehicles. Even assuming *arguendo* that service advisors are "salesm[e]n" and are "primarily engaged in selling" instead of administrative or clerical tasks, they do not sell "automobiles, trucks, or farm implements." The exemption does not cover selling services, as

services are not "automobiles." "[T]he exemption requires an employee to either primarily service the vehicle or sell the vehicle—not sell the service of the vehicle . . . ." *Id.*, *reprinted in* App., *infra*, at C4 (internal quotation marks omitted).

Nor are service advisors "primarily engaged in . . . servicing automobiles," as "servicing" means automotive manual labor such as maintenance and repairs. The first noun, "salesman," naturally pairs with the first gerund "selling," just as the last two nouns "partsman, or mechanic" naturally pair with the last gerund "servicing." By eliding crucial words, petitioner contrives a category of "salesmen primarily engaged in servicing automobiles." *E.g.*, Br. 1, 20, 24, 25, 31, 33. But that reading contravenes dictionary definitions, English grammar and usage, the statutory structure, other statutes' patterns, congressional intent, and canons of construction.

A. Service Advisors Are Not "Primarily Engaged in Selling or Servicing Automobiles, Trucks, or Farm Implements"

The exemption at issue applies only to salesmen, partsmen, or mechanics who are "primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). "Primarily engaged" means that "the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles." 29 C.F.R. § 779.372(d). Petitioner does not claim that service advisors are partsmen or mechanics or that they spend any, let alone the majority, of their time selling automobiles. Nor, as shown by ordinary English usage and Congress's own usage in other statutes,

are service advisors engaged in "servicing" automobiles. They therefore fall outside the exemption.

1.a. *The Statute Applies to Salesmen Who Sell Automobiles, Not Services or Other Items.* As written, the exemption at issue here enumerates three and only three direct objects of "selling" and "servicing": "automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A). Service advisors do not sell any of them.

Many dealership employees fall outside the exemption even though they sell automobile-related goods or services. Petitioner concedes that "salesmen who sell warranties, underbody coatings, or insurance" are not exempt. Cert. Reply Br. 7 n.2. Petitioner's amicus admits that employees who sell leases "**are not** *salesmen* under [§ 213(b)(10)(A)], since they are not selling vehicles to ultimate purchasers." NAT'L AUTO. DEALERS ASS'N, A DEALER GUIDE TO THE FAIR LABOR STANDARDS AND EQUAL PAY ACTS 12 (2005) (emphases in original).

Courts agree that other dealership sales staff are not exempt, because they do not sell automobiles. *E.g.*, *Chao* v. *Rocky's Auto, Inc.*, No. 01–1318, 2003 WL 1958020, at *1, *4–5 (10th Cir. Apr. 25, 2003) (unpublished) (declining to exempt finance managers and finance contractors as salesmen because they sell extended warranties, not automobiles); *Gieg* v. *Howarth*, 244 F.3d 775, 776–77 (9th Cir. 2001) (same, for finance writers, because they sell financing, insurance, and warranties, not automobiles).

Thus, petitioner's charge that DoL's regulation "divide[s] a dealership's salesforce in half" is refuted

by petitioner's own concession. Br. 2; *accord id.* at 3, 36, 44–45. It is the statute itself that limits "salesm[e]n" to employees who sell "automobiles," not those who may sell automobile-related goods or services.

b. Congress understood that it was exempting only automobile salesmen, not dealership employees who sold services or goods. Throughout the legislative history of the 1966 FLSA Amendments, Senators and Representatives consistently used "salesman" to refer only to vehicle or farm-implement salesmen, never service advisors or employees who sold other things. For example, as the Senate floor manager explained, "the salesman . . . can go out and sell an Oldsmobile, a Pontiac, or a Buick." 112 CONG. REC. 20,504 (Aug. 24, 1966) (Sen. Yarborough); *accord id.* ("The salesman tries to get people mainly after their hours of work" when "they go to look at automobiles."). Petitioner does not cite, and we cannot find, a single reference by any member of Congress to salesmen at automobile dealerships selling anything other than automobiles, let alone services. No speaker felt the need to clarify that "salesman" meant "automobile salesman"—it was obvious, and Congress had no other type in mind.

2.a. *"Servicing" Means Automotive Manual Labor.* To get around Congress's omitting "services" as a direct object of "selling," petitioner seeks to shoehorn "selling services" into the other gerund, "servicing." But service advisors are not engaged, let alone "primarily engaged," in "servicing automobiles." They do not work with their hands, but write up repair estimates and work orders before the servicing begins.

"Servicing" here means automotive manual labor, quintessentially maintenance or repairs. Contemporaneous dictionaries list performing mechanical work as the first definition of the transitive verb "service," and illustrate it with the example of repairing or maintaining an automobile. 4 WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2288 (2d ed. 1956) [hereinafter WEBSTER'S SECOND]; THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1304 (1st ed. 1966); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1185 (1st ed. 1969). In the *American Heritage* (at XLVII) and *Random House* (at xxix) dictionaries, listing a definition first conveys "the word's primary meaning." *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998). And the *Oxford English Dictionary*'s first definition of "servicing" is "[t]he action of maintaining or repairing a motor vehicle." 15 OXFORD ENGLISH DICTIONARY 39 (2d ed. 1989).

Congress has repeatedly used the term "servicing" in the United States Code to mean automotive manual labor, such as maintenance and repairs. In a statute regulating the Senate garage, for example, "the term 'servicing' includes, with respect to an official motor vehicle, the washing and fueling of such vehicle, the checking of its tires and battery, and checking and adding oil." 2 U.S.C. § 2025(b). Another statute limits ozone-depleting emissions by regulating who may "repair[] or servic[e]" vehicles' air conditioners: "[N]o person repairing or servicing motor vehicles for consideration may perform any service on a motor vehicle air conditioner . . . unless such person has been properly trained and certified." 42 U.S.C. § 7671h(c). If petitioner were correct that

service advisors were engaged in servicing automobiles, they would be forbidden to schedule such air-conditioning work unless they had been "properly trained and certified."

In this case, Congress used the term "servicing" in its ordinary sense, to refer to the activity of employees who maintain or repair automobiles. Because service advisors do neither, they fall outside the statutory exemption.

b. Petitioner erroneously asserts that "DoL would add one word to the statute": the word "personally." Br. at i, 28–29. But *DoL never used the word* "personally" in the 1970 or 2011 regulation, preamble, or notice of proposed rulemaking. App., *infra*, at B1–C6; Pet. Br. 25a–28a. The decision below used the word only in passing, in two sentences, to explain that the regulation reasonably reads "servicing" to require automotive manual labor. Pet. App. 13. The court acknowledged that "servicing" an automobile means performing maintenance or repairs on it, not writing up paperwork for someone else to maintain or repair it.

Rather, it is petitioner who seeks to expand the meaning of "servicing" by adding new words to the statute. Petitioner argues that service advisors are part of "the service process," Br. 25, "the process of servicing," Br. 23, 30, or "integral to the servicing process," Br. 1, 30. But the statute uses the word "servicing" to describe the particular activity of exempt employees, without adding any form of the word "process."

There is a fundamental difference between the statute as written and petitioner's rewrite. For

instance, judges are assisted by law clerks and bailiffs. As employees of the judicial branch or department, they take part in the *process* of judging or adjudicating cases. Yet no one would say that law clerks or bailiffs are engaged in judging.

Congress exempted only three specific types of employees, not entire "categories" or departments such as "the dealership's salesforce and service teams." *Contra* Pet. Br. 36, 39; *see id.* at 2, 3. Inventing an exemption for "all core sales and service employees" (*id.* at 44–45) or those "integral to the servicing process" (*id.* at 1, 30), whatever that means, would dramatically expand the exemption and ensnare courts in endless line drawing. That is a task for Congress or the agency, not the courts.

B. The Structure of the Exemption Confirms That Service Advisors Fall Outside It

The exemption applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A). According to both standard English usage and canons of statutory construction, the first subject "salesman" goes with the first gerund "selling," just as the latter subjects "partsman" and "mechanic" go with the latter gerund "servicing."

1. *Salesmen Sell, Not Service.* The statutory term "salesman" naturally fits with the first gerund "selling," not "servicing." In ordinary English, a salesman is one whose job is selling. The nouns "salesman" and "sale" and the transitive verb "sell" share the same etymological root, **saljan*. 14 OXFORD ENGLISH DICTIONARY 391, 388, 394 (2d ed.

1989); WEBSTER'S SECOND 2204, 2203, 2272. By contrast, "salesman" has no etymological connection to "service" or "servicing." This Court has relied on the etymological linkage between nouns and verbs, holding that Congress's use of the verb "carry" signaled its intent to reach the etymologically related nouns "car" and "cart." *Muscarello*, 524 U.S. at 128.

Empirical data on English usage confirm that "salesman" does not fit with "servicing" automobiles. In the entire Google Books database of more than 24 million books, the phrase "salesman servicing" appears only about 150 times, almost always in the context of salesmen servicing sales accounts or territories. https://books.google.com. *Only one example* relates to servicing automobiles or similar machines: a book reporting a case that denied worker's compensation to a gas-station attendant who was injured when fixing an automobile on the side for his own profit, because servicing automobiles was *not* part of his job selling gasoline. That is the exception that proves the rule. *Dunn* v. *Univ. of Rochester*, 194 N.E. 856, 856–57 (N.Y. 1935) (per curiam), *summarized in* N.Y. STATE, WORKMEN'S COMPENSATION LAW AND INDUSTRIAL BOARD RULES 17 (1936).

This remarkable absence of usage refutes petitioner's strained interpretation. Any ordinary English speaker understands that "salesm[e]n" engage in "selling," not "servicing automobiles," just as "mechanic[s]" engage in "servicing," not "selling."

2. Reddendo Singula Singulis: *The First Subject Goes with the First Verb, Just as the Last Subject Goes with the Last Verb*. Reading each subject noun in the statute with its respective gerund is also

required by a venerable linguistic canon. *Reddendo* (or *referendo*) *singula singulis*, also known as the "distributive canon," provides for "[a]ssigning or distributing separate things to separate persons, or separate words to separate subjects." BLACK'S LAW DICTIONARY 1467 (10th ed. 2014); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 214 (2012); 1 EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES: A GENERAL DISCUSSION OF CERTAIN FOUNDATIONAL SUBJECTS § 194, at 333 (1940); HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 74, at 226–27 (2d ed. 1911) .

a. The *reddendo* canon dates back as far as the Marshall Court. After Maryland and Virginia ceded land to form the District of Columbia, Congress passed a statute retaining the body of law that had existed in each formerly separate part of the District. *United States* v. *Simms*, 5 U.S. (1 Cranch) 252, 253–54, 256 (1803). Maryland and Virginia had different procedures for gambling fines and forfeitures: Maryland authorized proceeding by *indictment*. *Baker* v. *State*, 2 H. & J. 5, 5, 1806 WL 247 (Md. 1806). By contrast, Virginia authorized "any person" to bring an action of *debt* for the statutory penalty. *Simms*, 5 U.S. at 252–53; *see id.* at 254. The U.S. government "admitted that, under the laws of Virginia, an indictment for this penalty could not be sustained." *Id.* at 256; *see also Commonwealth* v. *Richards*, 1 Va. Cas. 133, 136, 1803 WL 322 (Gen. Ct. Va. 1803) (holding that Virginia could not recover a statutory gambling forfeiture by information).

Despite this history, the U.S. government brought a forfeiture action by indictment (the Maryland procedure) in Alexandria County (ceded by Virginia). The government argued that a federal statute had established a "new remedy" allowing the government to proceed by indictment. 5 U.S. at 256. The federal statute provided that "all fines, penalties and forfeitures accruing under the laws of the states of Maryland and Virginia, which by adoption have become the laws of this [D]istrict [of Columbia], shall be recovered with costs, by indictment or information in the name of the United States, or by action of debt in the name of the United States and of the informer." *Id.* at 254.

Writing for the Court, Chief Justice Marshall rejected the government's argument that because the statute was phrased disjunctively, it authorized proceeding by indictment. 5 U.S. at 258–59. Instead, applying the *reddendo* canon, the Court interpreted the statute to authorize proceeding by indictment only when state law would have authorized that state to proceed by indictment. *Id.* Because Virginia law allowed qui tam relators to bring actions of debt, it was "more proper to suppose the *qui tam* action, given in this case, to be the remedy, than an indictment." *Id.* at 259. The Court rejected the argument that one state's laws could be enforced via any of the three modes of proceeding: "It can not be presumed that [C]ongress could have intended to use the words in the unlimited sense contended for." *Id.* at 258.

b. A more recent example is also instructive. The late Justice Scalia and Garner offer the illustration of a school charter that provides: "[m]en and women are eligible to join fraternities and sororities."

SCALIA & GARNER 314. The sentence "cannot reasonably be read to suggest an unconventional commingling of sexes in club membership." *Id.* Applying ***reddendo singula singulis***, the first subject "men" goes with the first object "fraternities," just as the last subject "women" goes with the last object "sororities." Men cannot complain that they have been denied their right to join sororities. *See id.* The same would hold true if the charter included the word "any" and the disjunctive "or": providing that any man or woman is eligible to join a fraternity or sorority would mean the same thing. *See* BLACK § 74, at 226–27 (the statutory phrase "for money or other good consideration paid or given" means "money paid or other good consideration given").

c. Congress regularly follows this pattern in drafting statutes. Linguists call it "distributive" (as opposed to "collective") phrasing: certain nouns (or other words) in a list pair with certain verbs (or other words) in a second list. Etymological or semantic links among the corresponding words, like those between "salesman" and "selling," often make the distributive reading even clearer.

For instance, an agricultural statute allows certain measures to be repealed by vote of a majority of kiwifruit producers and importers if "the *producers* and importers *produce* and import more than 50 percent of the total volume of kiwifruit *produced* and imported by persons voting in the referendum." 7 U.S.C. § 7470(d) (emphases added to show the linked terms); *accord id.* § 4611(b)(1)(B). More than a hundred federal statutory provisions follow this general distributive pattern. App., *infra*, at D1–D41.

The decision below relied on a similar example: "if my dogs or cats are barking or meowing, then I know that they need to be let out." Pet. App. 14. Every reader understands that the first subject "dogs" goes only with the first gerund "barking," just as the last subject "cats" goes only with the last gerund "meowing." *Id.*

d. The order of words in the statute, as in the examples just given, reinforces the *reddendo singula singulis* inference. First often goes with first, as last often goes with last. In the dealership exemption, "salesman," the first noun, pairs with "selling," the first gerund. "Partsman" and "mechanic," the last two nouns, pair with "servicing," the last gerund. The kiwifruit example above follows this pattern. So does a statute regulating toxins and germ warfare: "In determining whether to include an agent or toxin on the list under subparagraph (A), the Secretary shall—(i) consider . . . (III) the availability and effectiveness of *pharmacotherapies* and prophylaxis to *treat* and prevent any illness caused by the agent or toxin . . . ." 7 U.S.C. § 8401(a)(1)(B) (emphases added to show the linked terms). As the dozens of statutes appended to this brief show, Congress often follows this particular distributive pattern, pairing the first noun in a statute with the first verb and the last noun with the last verb. App., *infra*, at D21–D35.

e. Petitioner resists this reasoning because the exemption lists three subjects (salesmen, partsmen, and mechanics) but only two gerunds (selling and servicing), so the subjects and verbs do not correspond one-to-one. Br. 33. But the distributive inference still holds, because certain subjects naturally

relate to certain verbs: "salesman" to "selling," "partsman" and "mechanic" to "servicing." If a zookeeper said, "When my cats, dogs, or seals are meowing or barking, I feed them," a listener would still understand that only cats meow, while only dogs and seals bark. One is not forced to imagine a cat with a terrible, barking cough. Thus, in *Simms*, Chief Justice Marshall's opinion applied *reddendo* even though the statute listed only two states (Maryland and Virginia) but three modes of proceeding (indictment, information, or action of debt).

Similarly, there are more than fifty distributively phrased federal statutes in which the number of nouns differs from the number of verbs. App., *infra*, at D1–D20. For instance, the Secretary of the Interior may "make loans to commercial fishermen for the purpose of chartering fishing vessels pending the *construction* or repair of vessels *lost*, *destroyed*, or damaged by the earthquake of March 27, 1964." 16 U.S.C. § 742c(e) (emphases added to linked terms).

Likewise, the statute prescribing licensing requirements for commercial drivers defines a "motor vehicle" as "a *vehicle*, *machine*, *tractor*, trailer, or semitrailer *propelled* or drawn by mechanical power . . . ." 49 U.S.C. § 31301(12) (same). The first three nouns relate only to the first participle, "propelled," and the last two nouns relate only to the latter participle, "drawn." While one could imagine a vehicle that is drawn, such as an automobile or motorcycle being towed or on a vehicle transport trailer, it would not be covered by the statute. The commercial driver needs a driver's license only for the tow truck

or tractor-trailer, not a separate license for the automobile or motorcycle being drawn.

3. *Petitioner's Reasons for Rejecting This Distributive Reading Are Wrong.* Petitioner resists this ordinary English distributive usage. Instead, it hypothesizes a contrary grammatical rule that presumes every verb in a sentence relates to every noun, "unless [a] disjunctive gerund is distinct to one of the disjunctive nouns." Br. 32. Notably, petitioner cites no authority for this supposed grammatical rule, and we can find none.

a. *"Respectively" Is Usually Superfluous.* Petitioner's purported rule would require writers to add "respective" or "respectively" to the end of a list of subjects, verbs, or objects, to negate petitioner's inference. But the leading authorities on English grammar hold that "respective" and "respectively" are usually superfluous. Strunk & White stated: "These words may usually be omitted with advantage." WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 51 (2d ed. 1972). Likewise, Fowler's second edition noted: "Delight in these words is a widespread but depraved taste. . . . [O]f ten sentences in which they occur, nine would be improved by their removal." H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 521 (2d ed. 1965). The wording of the exemption is consistent with Strunk & White's and Fowler's guidance.

b. *Petitioner's Reasoning Would Suggest a Non-Existent Category of Mechanics Who Primarily Engage in Selling.* Petitioner's supposed grammatical rule would also yield a very strange, nonexistent category of "mechanic[s] primarily engaged in selling

. . . automobiles." But anyone who is "primarily engaged in selling . . . automobiles" is not a mechanic at all; he is an automobile salesman. Similarly, a "salesman" who is "primarily engaged in" turning a wrench is not a salesman at all, but a mechanic.

Petitioner must thus concede that the statute is distributive at least with respect to mechanics. Petitioner can respond only that in such cases, as with the statutes appended to this brief, "the default [grammatical] rule can be overcome when the gerunds are by their nature limited to a particular noun." Br. 33 (citing no authority). Petitioner thus makes its *ipse dixit* unfalsifiable, waving off Fowler's, Strunk & White, and more than a hundred statutory counterexamples appended to this brief.

c. *Petitioner's Ellipses Obscure the Issue.* Much of petitioner's argument relies on its use of ellipses. Petitioner repeatedly omits the other subjects, gerunds, and objects, quoting the statute as exempting some variant of "any salesman . . . primarily engaged in . . . servicing automobiles . . . ." *E.g.*, Br. at i, 1, 20, 24, 25, 31, 33. If the entire provision exempted *only* "any salesman primarily engaged in servicing automobiles," with no other subjects, gerunds, or direct objects, one might strain to find some nonzero set of salesmen who service. But that is not what Congress wrote, and the exemption covers its intended type of salesmen—automobile salesmen—without recourse to such artifice.

d. *The Adjective "Any" Neither Expands the Plain Meaning of "Salesman" Nor Affects Its Direct Object "Automobiles."* Seeking to expand the statutory term "salesman," petitioner seizes on its modifier "any."

Br. 26. But the adjective "any" cannot expand the meaning of "salesman," the subject it modifies, let alone the direct object "automobiles," which it does not modify. The word "any" "do[es] not broaden the ordinary meaning of the" nouns it modifies. *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 93 (2006). Even when "any" is used as a "catchall . . . [it does] not . . . define what it catches." *Flora* v. *United States*, 362 U.S. 145, 149 (1960). A restrained reading of "any" is especially appropriate where, as here, an overbroad reading would lead to "strange and indeterminate results." *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 133 (2004).

e. *The Disjunctive "Or" Does Not Change the Analysis.* Petitioner repeatedly asserts that the disjunctive word "or" "plainly broadens the exemption." Br. 18; *accord id.* at 2, 17, 24. But neither of the authorities cited says anything about how multiple nouns relate to multiple verbs. They state only that separate terms in a list should "be given separate meanings" so that none becomes surplusage. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *see also FCC* v. *Pacifica Found.*, 438 U.S. 726, 739–40 (1978). DoL's regulation does not create surplusage; it gives effect to every word in the statute. It is only petitioner's ellipses that stitch together unrelated words into the unnatural combination of "salesmen . . . primarily engaged in . . . servicing automobiles."

f. *The Distributive Reading Makes Sense.* Petitioner's arguments rest on conflating words that sound alike but are different parts of speech: verbs such as "servicing" and nouns such as "services." Thus, petitioner asserts, without supporting authority,

that "[i]t would be nonsensical to suggest that an individual who is primarily engaged in selling the servicing of automobiles is engaged in *neither* selling *nor* servicing automobiles." Br. 19, 25 (emphases in original). But it is not "nonsensical to suggest that [a taxi dispatcher] who is primarily engaged in selling the [driving of taxis] is engaged in *neither* selling [taxis] *nor* [driving taxis]." Nor is it "nonsensical to suggest that [a maid-service marketer] who is primarily engaged in selling the [cleaning of houses] is engaged in *neither* selling [houses] *nor* [cleaning houses]."

Petitioner elides the difference between selling a service and performing the service oneself. A middleman or woman often sells the right to a service without performing the service himself or herself. That is true of insurance agents, travel agents, mortgage brokers, and the like. (Indeed, that is the premise of the sharing economy. Airbnb, for instance, sells overnight stays in private homes without itself accommodating travelers. https://www.airbnb.com.) Service advisors are no different.

Petitioner's example reflects its confusion of nouns and verbs. In petitioner's example, "the servicing of automobiles" is an awkward way of phrasing the direct object "automobile services." In that example, the person selling the services need not do the servicing. But in the actual statutory exemption, "servicing" functions as an active verb. That means that the subject of the active verb, the "salesman," must perform the "servicing" upon the direct object "automobiles." Even if a salesman sells automobile services performed by a mechanic, the salesman is not the one who is "servicing" the automobiles.

C. Congress Understood This Distributive Reading When It Adopted the 1974 FLSA Amendments

The 1974 FLSA Amendments reflect Congress's understanding that salesmen primarily engage in selling, not servicing. On the day of the final floor vote on the 1974 bill, the House floor manager, Representative Dent, distributed a summary section-by-section analysis of the final bill. It read in part: "*Salesmen, Partsmen, and Mechanics*.—Provides an overtime exemption for *any salesman primarily engaged in selling automobiles*, trailers, trucks, farm implements, boats, or aircraft if employed by a [dealership]. Also provides an overtime exemption for partsmen and mechanics of automobile, truck, and farm implement dealerships." 120 CONG. REC. 8602 (Mar. 28, 1974), *reprinted in* 2 LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS AMENDMENTS OF 1974, at 2391 (1976) [hereinafter 1974 LEGISLATIVE HISTORY] (second emphasis added). No one thought they were exempting salesmen who engaged in anything other than selling vehicles or farm implements.

The structure of the 1974 amendment underscores this understanding. The original 1966 exemption, § 213(b)(10), had no subsections, but the 1974 amendments split the provision into two subsections. Subsection (A) retained the existing exemption for salesmen, partsmen, and mechanics at automobile, truck, and farm-implement dealerships. Congress removed trailer and aircraft dealerships (and added boat dealerships) to a new subsection (B), limiting it to "any salesman primarily engaged in selling." The gerund "servicing" was omitted along with the subjects "partsman, or mechanic." *Compare* App., *infra*,

at A1 (1966 version), *with* Pet. Br. App. 6a–7a (1974 version).

These amendments made two changes. First, the new subsection (B) paired boat salesmen only with "selling," because Congress understood that salesmen sell. The second change is a negative inference, but even more telling. The Senate floor manager's section-by-section analysis, offered shortly before the Senate passed the bill, explained the 1974 revision as "repealing the overtime exemption for partsmen and mechanics in . . . trailer[] . . . [and] aircraft [dealerships]." 120 CONG. REC. 8763 (Mar. 28, 1974), *reprinted in* 1974 LEGISLATIVE HISTORY 2411; *accord* H.R. REP. NO. 93–313, at 47 (1974), *reprinted in id.* at 2156; S. REP. NO. 93–690, at 44 (1974), *reprinted in id.* at 1548; *see also* 76 Fed. Reg. at 18,837 (DoL's explanation of history leading up to 2011 regulation).

When Congress eliminated partsmen and mechanics for subsection (B), the gerund "servicing" went with them. One verb remained with "salesman": "selling." If, as petitioner argues, Congress had meant to cover a type of "salesm[e]n . . . primarily engaged in . . . servicing," it would have acknowledged that the amendment had *also* repealed the supposed exemption for "salesm[e]n . . . primarily engaged in . . . servicing" trailers and aircraft. But no one thought such an employee existed—the repeal affected only partsmen and mechanics. Congress's understanding of its amendment reflected common parlance: salesmen sell, and partsmen and mechanics service.

D. Congress, by Expressly Including "Partsman," Did Not Implicitly Add "Service Advisor" to the Statute

Petitioner concedes that service advisors do not go "under the hood performing the service." Br. 30. Nevertheless, it argues that when Congress expressly added "partsman" to the list of exempt employees, it implicitly expanded the meaning of "servicing" beyond employees who do "the hands-on servicing of automobiles" to all employees who are "integral to the servicing process." Br. 19, 30. It claims that "[p]artsmen are no more (or less) directly involved in the hands-on servicing of automobiles than service advisors." Br. 19. Unless one reads "servicing" expansively, it asserts, "partsmen" would be "nearly a null set." Br. 30.

Petitioner's unsupported assertions are mistaken. Partsmen, unlike service advisors, work with their hands, work in the back with mechanics, and so wear uniforms suitable for dirty work.

1. *Some Partsmen Perform Automotive Manual Labor.* From 1966 through today, automobile dealership partsmen have had two distinct roles. Some sell parts directly to consumers, while others work with and supply parts to the dealership's mechanics. *See Automobile Parts Countermen, in* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, BULL. NO. 1450, at 312, 312 (1966–67 ed.) [hereinafter 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK].

Both automobile and farm-implement dealerships often have a separate parts counter on the shop floor staffed by a few dedicated partsmen. CAL. STATE

DEP'T OF EDUC., AUTO PARTS MAN 8–9 (1967); *see also* Charlie Cape, *They're Organized for Efficiency at Sell & Son*, IMPLEMENT & TRACTOR, Feb. 7, 1973, at 9–10. As one contemporary partsman training manual observed, "th[e] interdependence of departments becomes most evident at the [partsman's] shop counter, where mechanics and parts men meet. Nowhere in the automotive agency is cooperation needed more than here." AUTO PARTS MAN 49.

Partsmen need extensive mechanical expertise to assist mechanics. From an inventory of several thousand parts (many nearly identical), a partsman must select the correct ones for a repair job, using each manufacturer's intricate and unique inventory control system. 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 312; AUTO PARTS MAN 50, 65–83, 91–92, 103. They must pore over service bulletins and manuals to maintain their encyclopedic knowledge of parts in the face of rapid technological change. AUTO PARTS MAN 50, 61.

In the course of "requisitioning, . . . and dispensing parts" to mechanics, 29 C.F.R. § 779.372(c)(2), partsmen do automotive manual labor. To assist mechanics, some partsmen measured, tested, adjusted, repaired, and reconditioned parts:

> Parts countermen may use micrometers, calipers, fan-belt measurers, and other devices to measure parts for interchangeability. They may also use coil-condenser testers, spark plug testers, and other types of testing equipment to determine whether parts are defective. In some stores—particularly in small wholesale establishments—they may

> repair parts, using equipment such as brake riveting machines, brake drum lathes, valve refacers, and engine head grinders.

Automobile Parts Countermen, *in* 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 312–13.

Partsmen not only measure parts, but also customize their size to fit particular trucks, tractors, farm equipment, and automobiles. Parts "counter clerk[s]" for these vehicles and implements "[m]ay measure engine parts, using precision measuring instruments, to determine whether similar parts may be machined down or built up to required size." EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, *Salesperson, Parts (retail trade; wholesale tr.) alternate titles: counter clerk; parts clerk*, *in* DICTIONARY OF OCCUPATIONAL TITLES § 279.357-062 (4th ed. rev. 1991), https://perma.cc/6BCP-YN5A.

Even partsmen who do not repair or adjust parts still perform automotive manual labor. Parts counters typically open onto shop floors, and many partsmen hand parts over the counter directly to mechanics. Because they quite literally handle parts, they wear T-shirts, coveralls, jumpsuits, or similar work gear, not suits and ties or equivalent business attire. See, for instance, the photograph from DoL's 1966–67 handbook, showing a T-shirt-clad "[a]utomobile parts counterman dispens[ing] [a] part to [a] mechanic" by handing it to him over a counter. 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 313, *reprinted in* App., *infra*, at E3; *cf. Automobile Service Advisors*, *in id.* at 314–15, *reprinted in* App., *infra*, at E2 (showing a service advisor wearing a tie).

Partsmen must work with their hands to "cooperate [with mechanics] in the handling of shop requisitions." AUTO PARTS MAN 50. After the mechanic prepares a requisition for needed parts, the partsman searches through the stock room, grabs the stocked parts, orders those that are not already in stock, and dispenses (hands) the needed parts to the mechanic. *Id.* at 50–51; *see also* App., *infra*, at E3. Thus, as DoL's regulation provides, partsmen both "requisition[]" and "dispens[e]," as well as "stock[]," parts. 29 C.F.R. § 779.372(c)(2).

Partsmen rely on their mechanical expertise to pick and hand the right parts to mechanics at the right time. To ensure that a mechanic is never idle, the partsman organizes the work based on knowledge of what parts the mechanic will need first. AUTO PARTS MAN 51. So, for a transmission repair job, a partsman must know to hand the mechanic the proper "clutch discs, plates, and clutch drum bushing first." *Id.*

In short, partsmen, like mechanics, work with their hands. They serve as mechanics' right-hand men or women. Like mechanics and unlike service advisors, partsmen service automobiles and may have the grease under their fingernails to prove it. *Contra* Pet. Br. 19, 30.

2. *When the Conference Committee Combined the House Version with the Senate's* ***Restrictive*** *Phrase, It Did Not Greatly* ***Expand*** *the Exemption's Scope.* Petitioner's inferences from the combination of "partsman" and "servicing" are particularly strained given the drafting history of the exemption. The version of the exemption that passed the House exempted

partsmen but had no requirement that they be primarily engaged in selling or servicing. H.R. 13,712, 89th Cong. § 209 (Mar. 29, 1966). The Senate Labor Committee removed "partsman" and added the requirement that an exempt salesman or mechanic be "primarily engaged in selling or servicing" a vehicle or farm implement. H.R. 13,712, 89th Cong. § 209 (Aug. 23, 1966). During the floor debate, the Senate adopted a separate clause for "partsmen primarily engaged in selling or servicing farm implements." 112 CONG. REC. 20,506 (Aug. 24, 1966). The Conference Committee then took the list of subjects from the House bill, including partsmen, and combined it with the Senate's restriction to those "primarily engaged in selling or servicing." H.R. REP. NO. 89-2004, at 7 (Sept. 6, 1966) (Conf. Rep.).

If the Conference Committee had meant to *expand* the meaning of "servicing" dramatically, combining the House's list of subjects with the Senate's *restrictive* phrase in conference would have been a remarkably oblique way to do it. The Conference Report reflects no such intention, stating only: "The conference substitute conforms to the House provision regarding partsmen, except that such exemption shall be available only to salesmen, partsmen, and mechanics primarily engaged in selling or servicing such vehicles." *Id.* at 19.

3. *Congress's Focus in Including Partsmen Was on Farm Implements, Not Automobiles.* Congress included partsmen in the exemption after extensive testimony focused on their roles in servicing farm implements as mechanics' right-hand men or women. *Minimum Wage-Hour Legislation: Hearings Before the Subcomm. on Labor Standards of the H. Comm.*

on Educ. & Labor, 86th Cong. 699–711 (1960) (testimony of Paul Milliken, Executive Vice President, National Retail Farm Equipment Association); *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the H. Gen. Subcomm. on Labor of the H. Comm. on Educ. & Labor*, 89th Cong. 627–40 (1965) [hereinafter *1965 Hearings*] (statement of National Farm & Power Equipment Dealers Association).

Even a short delay while awaiting equipment repairs could allow a farm's crops to rot, spoil, freeze, or become infested, ruining farmers financially. Harvesting delays cost farmers hundreds, if not thousands, of dollars every single day. Donnell Hunt, *Let's Analyze the Breakdown*, IMPLEMENT & TRACTOR, Apr. 7, 1971, at 22, 28. Thus, mechanics *and* skilled partsmen had to be on call at all hours of the day or night to "make emergency repairs" on "increasingly more complicated [and] highly sophisticated" machinery. *1965 Hearings* 630, 632; *see also* 112 CONG. REC. 20,503 (Sen. Bayh) (citing the need for a trained partsman's knowledge and ability). Like the mechanic, the "parts man [had to be available to] respond[] to the emergency call of a farmer for a badly needed part." *1965 Hearings* 635.

Congress therefore added partsmen to the exemption to accommodate these concerns of farm-implement dealers. The first draft of the 1966 Amendments introduced in the House created an exemption for partsmen who worked at farm-implement dealerships, but not those at automobile and truck dealerships. H.R. 13,712, 89th Cong. § 209 (Mar. 16, 1966). Likewise, after a Senate committee removed partsmen from the exemption, farm-state

Senators insisted on restoring their exemption. With the increasing mechanization of farming, "an infinitesimally small difference between parts can determine whether a machine will work or not. Therefore, the knowledge and ability of the trained partsman is very much in demand." 112 CONG. REC. 20,503 (Sen. Bayh). As Senator Mansfield explained, partsmen "ha[ve] to be available during harvest season—and before and after, to a lesser extent—at all hours of the day." *Id.*

The Senate therefore adopted an amendment exempting "partsmen primarily engaged in selling or servicing farm implements." 112 CONG. REC. 20,506. As the Senators understood, farm-implement partsmen had to work irregular and seasonal hours alongside mechanics.

In short, unlike a service advisor, a partsman is engaged in servicing, performing automotive manual labor as the mechanic's right-hand man or woman. Congress specifically exempted partsmen, not service advisors, recognizing their essential agricultural role.

E. Congress Limited the Exemption to Salesmen, Partsmen, and Mechanics Because of Their Irregular Hours and Locations.

The textual enumeration of three and only three types of dealership employees reflects Congress's considered purpose. Congress enumerated these three types primarily because they often had to work unpredictable hours, including nights and weekends. Unlike other dealership employees working fixed hours on site, salesmen were expected to "go out and sell an Oldsmobile, a Pontiac, or a Buick all day long

and all night." 112 CONG. REC. 20,504 (Sen. Yarborough). As the Senate floor manager of the 1966 amendments explained, "[t]he reason for exempting the salesmen and the mechanics was the difficulty of their keeping regular hours. The salesman tries to get people mainly after their hours of work. In some cases a man will leave his job, get his wife, and go to look at automobiles. So the hours of a salesman are different." *Id.*

Partsmen and mechanics likewise must work irregular hours beyond normal business hours, often seasonally. Several farm-state senators emphasized that "during planting, cultivating and harvesting seasons, [farmers] may call on their dealers for parts at any time during the day or evening and on weekends." 112 CONG. REC. 20,502 (Sen. Bayh). Senator Bayh recounted his own experience of "trying to get my tractor, combine, or corn-picker repaired, for which the mechanic could not find the necessary part; and he had to call the partsman, *get him out of bed*, and get him to come down to the store to show him which part should be used." *Id.* at 20,504 (Sen. Bayh) (emphasis added); *accord id.* at 20,502–04 (Sens. Bayh, Hruska, and Mansfield).

In addition, mechanics and salesmen sometimes work off-site, which makes it "difficult to keep their time records." 112 CONG. REC. 20,505 (Sen. Clark). The Senate floor manager gave the example of "the mechanic [who] goes out and answers calls in the rural areas. . . . who has to go out on the snow-covered field." *Id.* at 20,504 (Sen. Yarborough). "The mechanics and the salesmen . . . . do not get overtime because their work is outside." *Id.* It is "the kind of

work outside the store which gives some excuse, at least, for exempting the salesman and the mechanic." *Id.* at 20,505 (Sen. Clark).

Service advisors did not present either of these concerns. The job type was distinct and known in the industry when the 1966 amendments were drafted and debated. *Automobile Service Advisors*, *in* 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 314. Service advisors worked on-site in order to "confer[] with the customer to determine his service needs" and "arrange[] for a mechanic to do the work." *Id.* They typically worked relatively fixed schedules of "from 40 to 48 hours a week." *Id.* at 316.

The job does not require irregular, unpredictable, or seasonal hours, or working off-site. So Congress saw no need to exempt service advisors (or any of dozens of other types of dealership employees).

F. As Congress and This Court Understood at the Time, Exemptions from the FLSA's Broad Guarantee of Overtime Should Not Be Expanded Beyond Their Clear Terms

When the salesman/partsman/mechanic exemption was enacted and re-enacted, both Congress and this Court understood that Congress's limited exemptions from the FLSA's overtime-pay guarantee should not be expanded. This Court has long enforced this canon of construction, and Congress adopted the FLSA amendments against this backdrop. Such canons of construction are quintessential "traditional tools of statutory construction" required at *Chevron* step one. *Chevron*, 467 U.S. at 843 n.9; *accord City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J.,

concurring in part and concurring in the judgment). The decision below briefly and correctly adverted to this canon. Pet. App. 6–8 & n.3, 11.

1. *This Court's FLSA Canon Requires Reading FLSA Exemptions Narrowly.* "The [FLSA] declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission." *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950) (footnote omitted). "Where exceptions were made, they were narrow and specific." *Id.* at 517.

Thus, for more than half a century, this Court has read FLSA exemptions narrowly, declining to expand them beyond their plain terms. As Justice Harlan observed, "It is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed." *Mitchell* v. *Ky. Fin. Co.*, 359 U.S. 290, 295 (1959). Hence, their "application [is] limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). This FLSA-specific canon dates to this Court's earliest decisions interpreting the statute. *See A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945).

The FLSA-exemption canon is a specific application of this Court's more general rule that when Congress establishes a general mandate, exceptions should be "narrowly construed." *E.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 565 (2011) (Freedom of Information Act exemptions); *see Chickasaw Nation* v. *United States*, 534 U.S. 84, 95 (2001) (noting canon that tax exemptions must be "clearly expressed"); *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998) (reiterating "well-known" canon that exceptions to discharge in

bankruptcy "should be confined to those plainly expressed" (quoting *Gleason* v. *Thaw*, 236 U.S. 558, 562 (1915))).

2. *Congress Legislated Against the Backdrop of This Court's Canon.* When Congress passed the 1966 and 1974 FLSA amendments, including § 213(b)(10), this FLSA canon was, in Justice Harlan's words, a "well settled" background principle. *Mitchell*, 359 U.S. at 295.

When considering other statutory-interpretation questions, this Court frequently looks to well-settled background principles to illuminate Congress's intent. *See, e.g.*, *B & B Hardware, Inc.* v. *Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (issue preclusion); *Bond* v. *United States*, 134 S. Ct. 2077, 2092 (2014) (presumption against encroaching on traditional state domains); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (presumption against extraterritorial application of statutes). For example, "Congress is presumed to incorporate equitable tolling into federal statutes of limitations because equitable tolling is part of the established backdrop of American law." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014). The same is true here.

Congress legislated against this backdrop and relied upon it. In keeping with this canon, a key member of Congress explained that the salesman/partsman/mechanic exemption would be construed narrowly. In 1967, Congress began considering revisions to the exemption, in what eventually became the 1974 amendments. The House floor manager of the 1966 amendments, Representative John Dent, explained to a boating industry representative that the revised

exemption would have to be narrowly construed, like the existing one: "This bill would not go down to the level of the employees around the marinas, for instance, but would only, *as it is now written*, I am sure, *be strictly interpreted* to mean only those who are salesmen, partsmen and mechanics, the same as the automobile industry and the farm implement industries [that] are so exempt." *Amendment to Exempt Employees of Boat Sales Establishments: Hearing Before the Gen. Subcomm. on Labor of the H. Comm. on Educ. and Labor*, 90th Cong. 5 (1967) (emphases added).

In short, at *Chevron* step one, service advisors are "primarily engaged" neither in "selling . . . automobiles" nor in "servicing automobiles." "Servicing" requires automotive manual labor, not just selling services. The first subject "salesman" naturally goes with the first gerund "selling," just as the last noun "mechanic" naturally goes with the last gerund "servicing." The statute itself compels the conclusion, reflected in DoL's consistent regulations, that service advisors are *not* exempt from the FLSA's overtime requirement.

II. At *Chevron* Step Two, DoL Reasonably Declined to Expand the Statutory Exemption to Service Advisors

Even if the statute permitted petitioner's countertextual reading of the salesman/partsman/mechanic exemption, it would hardly compel it or make the contrary conclusion unreasonable. At *Chevron* step two, DoL's interpretation of the statute is reasonable and warrants deference. The agency's "view governs

if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

This is a textbook case for *Chevron* deference. DoL is in the best position to use its technical expertise to resolve any ambiguity in the salesman/partsman/mechanic exemption. This Court, in *Long Island Care*, recognized DoL's delegated authority to interpret the FLSA amendments. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 165 (2007). DoL, not the courts, is best situated to weigh policy tradeoffs and engage in any line drawing.

A. *Chevron* Provides the Applicable Standard

Petitioner's half-hearted effort to dispute whether the *Chevron* framework applies here is meritless. Congress granted DoL authority "to promulgate necessary rules, regulations, or orders with regard to the [FLSA] amendments" in both the 1966 and 1974 FLSA Amendments, which enacted and re-enacted the salesman/partsman/mechanic exemption. Pub. L. No. 89–601, § 602, 80 Stat. at 844; *accord* Pub. L. No. 93–259, § 29(b), 88 Stat. at 76, *both reprinted in* App., *infra*, at A2. In *Long Island Care*, this Court relied on the latter provision in holding that another DoL notice-and-comment regulation merited *Chevron* deference. 551 U.S. at 165. Since "Congress delegated authority to [DoL] generally to make rules carrying the force of law," and the 2011 notice-and-comment regulation "was promulgated in the exercise of that authority," *Chevron* governs. *United States* v. *Mead Corp.*, 533 U.S. 218, 226–27 (2001).

Petitioner appears to argue (at 36) that *Chevron* deference depends on a particularized delegation that mentions the specific provision at issue in this case. But *Chevron* deference "does not turn on whether Congress's delegation of authority was general or specific." *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 57 (2011); *accord City of Arlington*, 133 S. Ct. at 1874 ("[A] general conferral of rulemaking or adjudicative authority has [never] been held insufficient to support *Chevron* deference . . . .").

The 2011 notice-and-comment regulation is legislative. *Contra* Pet. Br. 36. "Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'" *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (citation omitted). But even if it were interpretive, it would still merit *Chevron* deference. As petitioner concedes, "the *Chevron* framework applies to interpretive regulations, including those promulgated under the FLSA." Cert. Reply Br. 5 (citing *Long Island Care*, 551 U.S. at 171–72 and *Mayo Found.*, 562 U.S. at 52–58). DoL's regulation must thus be analyzed under the *Chevron* framework.

B. DoL Reasonably Heeded the Weight of the Comments on the Proposed Provision

DoL followed proper rulemaking procedures here. It issued a notice of proposed rulemaking, solicited and received comments, and weighed them before issuing its notice-and-comment regulation. This notice-and-comment process "is designed to assure due deliberation," and indeed, DoL deliberated for almost three years. *Smiley* v. *Citibank (S.D.), N.A.*,

517 U.S. 735, 741 (1996); *see* 5 U.S.C. § 553. In promulgating its final rule, DoL acknowledged the "strongly held views" on the issues and "carefully considered all of the comments, analyses, and arguments made for and against the proposed changes." 76 Fed. Reg. at 18,832. Its consideration included prior judicial opinions and legislative history. *Id.* at 18,838. Though petitioner asserts (at 21, 41) that DoL "complete[ly] lack[ed] [] justification" for reaffirming its 1970 rule and offered no "language explaining the change and accounting for reliance interests," DoL explained its decision with care and responded to the comments it received. App., *infra*, at C1–C6.

Petitioner's own amicus raised the same policy concerns during DoL's rulemaking, including reliance, that petitioner and its amici raise here. DoL considered and ultimately rejected these arguments. After DoL promulgated its final notice-and-comment regulation but before it went into effect, petitioner or its amici could have challenged it under the Administrative Procedure Act, 5 U.S.C. § 702, but chose not to do so. Instead, they now seek to overturn the notice-and-comment rulemaking process by relitigating the same policy concerns that the agency already considered in its rulemaking.

1. *DoL Heeded Commenters' Observations About Improper Lower-Court Reasoning.* In its notice of proposed rulemaking, DoL acknowledged that some lower courts had exempted service advisors on the theory that they are "'functionally similar'" to mechanics and partsmen and work as an "'integrated unit'" with them. 73 Fed. Reg. at 43,658 (quoting *Deel Motors*, 475 F.2d at 1097), *reprinted in* App.,

infra, at B3. Two of the seven comments that addressed the issue urged DoL to follow *Deel Motors* and its progeny, but the majority of comments criticized this reasoning as misreading the statute. 76 Fed. Reg. at 18,838 (summarizing comments). DoL agreed with commenters that, contrary to lower-court reasoning, the regulation was consistent with the statute. *Id.*, *reprinted in* App., *infra*, at C3–C5.

2. *DoL Fully Considered the Industry's Stated Reliance Concerns.* DoL also considered the industry's claimed reliance on non-binding agency enforcement materials. Petitioner's amicus asserted then, as it does now, that the dealership industry had "long relied" on the 1978 opinion letter. *See* National Automobile Dealers' Association, Comment Letter 1 (Sept. 26, 2008), http://tinyurl.com/oyjbwoq. DoL acknowledged amicus's claim that its members "ha[d] relied upon the Administrator's 1978 opinion letter," but concluded that its understanding of the statute and its policies outweighed that interest. *See* 76 Fed. Reg. at 18,838, *reprinted in* App., *infra*, at C3–C4.

3. *DoL Considered Other Indications of Congress's Intent.* Twelve members of Congress, including the chairs of the four relevant House and Senate committees and subcommittees, opposed exempting service advisors, based on congressional intent. They explained that, in enacting the overtime exemption, Congress "only intended to exempt 'salesmen' who sell automobiles and 'mechanics' who service automobiles," not "service employees who sell mechanical services." George Miller et al., Comment Letter 7–8 (Sept. 26–27, 2008), http://tinyurl.com/gu4f7ne. Congress's "understanding was that a car 'salesman'

sells automobiles, and that a salesman does not service automobiles or sell mechanical services." *Id.*, *reprinted in* App., *infra*, at C4.

Three other commenters traced the legislative history of the provision, noting the exemption's precise limitations. DoL agreed that the automobile dealership provision "limit[s] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838, *reprinted in* App., *infra*, at C6.

Thus, in concluding that "[then-]current [29 C.F.R. §] 779.372(c) sets forth the appropriate approach to determining whether [service advisors] are subject to the exemption," DoL carefully considered all the comments, repromulgating its 1970 interpretation as a notice-and-comment regulation. *Id.*

C. After Temporarily Acquiescing to Contrary Lower Court Case Law, DoL Acted Reasonably in 2011 by Repromulgating its 1970 Rule as a Notice-and-Comment Regulation

1. *DoL's Temporary Enforcement Acquiescence Never Changed Its Regulation.* DoL acted reasonably in reaffirming its longstanding 1970 rule through its 2011 notice-and-comment regulation. Both the 1978 opinion letter and the 1987 Field Operations Handbook were nonbinding documents in which DoL said it would decline to enforce this part of the regulation, after pre-*Chevron* reported decisions by one circuit and three district courts had (erroneously) determined that the agency's interpretation was not "the best." *Deel Motors*, 475 F.2d at 1097; Pet. Br. 9–11 & nn.2, 3. The 1987 handbook, which petitioner

relies on, was an internal agency enforcement document. As DoL itself states, it "is not used as a device for establishing interpretative policy." U.S. DEP'T OF LABOR, WAGE & HOUR DIV., REV. NO. 559, FIELD OPERATIONS HANDBOOK at foreword -1 (Apr. 4, 1988).

Unlike "notice-and-comment rulemaking, . . . [i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen* v. *Harris Cty.*, 529 U.S. 576, 587 (2000). This Court has held that similar opinion letters did not prevent an agency from taking a contrary position through rulemaking. *Smiley*, 517 U.S. at 743. Any effect these earlier materials may have had was erased by the 2008–2011 notice-and-comment rulemaking, which took a closer, more formal, and more comprehensive look at the issue.

2. *Regardless, Under* Chevron, *Agencies Are Free to Change Their Positions.* Even if the 2011 regulation had been a formal change of position, that would not matter. Under *Chevron* step two, agencies are free to change course so long as they provide reasoned explanations for doing so. "[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal." *Smiley*, 517 U.S. at 742. "[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Id.*; *accord Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

In *Chevron* itself, this Court upheld an agency's change of position. 467 U.S. at 863–64. "An initial agency interpretation is not instantly carved in stone." *Id.* at 863.

Petitioner's complaint (at 11) that the 2011 final rule did not "adopt[] the proposed regulation," but instead "changed course" and adhered to DoL's earlier view, completely misunderstands the rulemaking process. An agency is in no way obligated to adopt regulations it floats in a notice of proposed rulemaking. To the contrary, the point of the notice is to give the agency, and affected parties, the opportunity to consider whether the proposal should be accepted. Choosing not to adopt a proposed rule is valid as a "logical outgrowth" of a proposal. *Long Island Care*, 551 U.S. at 174–75.

3. *Applying Duly Promulgated Regulations Is Not Retroactive.* Petitioner argues that DoL's change of position amounts to "impos[ing] significant retroactive liability for settled industry practices." Br. 22; *accord id.* at 3, 18, 42, 43; *see also id.* at 3, 43 (citing *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012), which rejected a novel DoL litigation position staked out for the first time in an amicus brief, not a notice-and-comment regulation).

Contrary to petitioner's claim, there is nothing "retroactive" about applying the 2011 notice-and-comment regulation to post-2011 conduct. As this Court recognized in *Long Island Care*, the notice-and-comment process itself gives regulated parties ample notice. Particularly because "the Department [of Labor's] recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any

[unfair] surprise unlikely here[,] the change in interpretation alone presents no separate ground for disregarding the Department [of Labor]'s present interpretation" of the FLSA overtime exemption. *Long Island Care*, 551 U.S. at 170–71 (citation omitted). And DoL gave employers an extra margin of fair notice, providing that its regulation would not take effect until thirty days after its issuance. App., *infra*, at C1.

Moreover, Congress has already provided statutory protections that allay any retroactivity concerns. The Portal-to-Portal Act provides an affirmative defense for employers who relied on prior DoL interpretations. 29 U.S.C. § 259. Congress has thus addressed the precise good-faith "reliance" interests raised by petitioner (at 3, 21, 36, 40, 41, 43). If there were any concern about conduct predating the 2011 regulation, the district court on remand could consider the applicability of a statutory reliance defense. But as petitioner has neither pleaded nor proved this defense below, it is not properly before this Court.

Unlike petitioner's amorphous reliance argument, the Portal-to-Portal Act defense does not permit employers to rely on DoL interpretations indefinitely, but instead applies only until the "interpretation, practice, or enforcement policy is modified or rescinded." 29 U.S.C. § 259. DoL's issuance of its final regulation on April 5, 2011 forecloses any claim of continued reliance beyond its effective date.

D. Employers Cannot Evade the FLSA's Protections by Paying Employees on Commission Without Satisfying Another FLSA Exemption's Specific Requirements

1. *Employers Cannot Circumvent the FLSA's Overtime Requirement Simply by Paying on Commission.* Petitioner's assertion that an employer may have "negotiated" compensation with employees (Pet. 3, 17, 30, 33, 34) is of no significance. Employers cannot evade the overtime requirement simply by hiring employees on a piecework or commission basis. Unless employees fall within an enumerated exception to the FLSA's broad overtime-pay guarantee, they are entitled to overtime.

Nor may petitioner complain that it failed "to strictly track the number of hours worked." Br. 44; *see* J.A. 41. The FLSA has long required employers to keep careful wage and hour records, regardless of how they pay their employees. 29 U.S.C. § 211(c). Enforcing the law against employers who breach their statutory recordkeeping duties creates no "windfall" (Pet. Br. 44), but simply implements the statutory remedies. Petitioner's worry rings particularly hollow here, as petitioner required respondents to work fixed shifts on-site, from 7 a.m. to 6 p.m., five days per week. J.A. 39, 41.

Contrary to petitioner's apparent argument (at 20, 38, 39, 42, 43–44), commission pay is neither necessary nor sufficient to qualify for the salesman/partsman/mechanic exemption. The exemption nowhere mentions commissions or other methods of pay. As for the positions exempted, automobile mechanics and partsmen were (and are) paid in a variety

of ways: hourly wages, salaries, commissions, or some combination of these. *Automobile Parts Countermen, in* 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 314; *Automobile Mechanics, in id.* at 477, 480. Farm equipment salesmen had varying pay arrangements, with about a third on salary alone, at most a ninth on commission alone, and more than half on some combination. *More About Compensating Salesmen*, IMPLEMENT & TRACTOR, Feb. 7, 1974, at 10, 11, 49 (reporting surveys from 1964 and 1973). Conversely, petitioner concedes that automobile insurance salesmen, warranty salesmen, and underbody coating salesmen are not exempt, whether or not they are paid on commission. Cert. Reply Br. 7 n.2.

In short, the method of calculating compensation has nothing to do with whether a given employee falls within the salesman/partsman/mechanic exemption. And in any event, service advisors are paid in myriad ways. Some are paid on commission, others are paid salaries or by the hour, and others receive a combination of salary or hourly wages plus commission. *Automobile Service Advisors, in* 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 316; Pet. Br. 13 n.4 (conceding the range of compensation packages). None of this has anything to do with the issue here.

2. *Commissioned Employees May Fall Within a Different FLSA Exemption, Not the Dealership Exemption.* While the salesman/partsman/mechanic exemption does not refer to compensation or commissions at all, the FLSA does include a different exemption covering a variety of commissioned retail and service employees: 29 U.S.C. § 207(*i*). That provision requires the employer to prove that the

employees (a) work for a "retail or service establishment"; (b) earn more than one-and-a-half times the minimum wage; and (c), receive more than half of their compensation as "commissions on goods or services" over a "representative period" of at least "one month." *Id.* Commission-based employees who do not satisfy these requirements, such as those paid a percentage of regularly predictable sales with only a small increment for sales above expected sales, are entitled to overtime pay. 29 C.F.R. § 779.416(c).

The *expressio unius* canon cautions against expanding such carefully limited exemptions. Yet petitioner repeatedly inverts the *expressio unius* inference. It seeks to expand § 207(*i*)'s express statutory exemption for certain commission-based employees into an implied exemption for service advisors, whether they are paid salaries, commissions, or both. Br. 6, 20–21, 38; *see also id.* at 13 n.4 (noting that some service advisors receive salaries or hourly wages). Petitioner likewise seeks to expand an express statutory exemption for certain outside sales employees who must travel away from the workplace into an implied exemption for other employees who make sales, even if they do so exclusively within the workplace. Br. 6, 20–21, 38 (analogizing to 29 U.S.C. § 213(a)(1)). These maneuvers would subvert the terms of each specific exemption.

3. *The § 207(i) Exemption Further Allays Petitioner's Concerns About Reliance and Industry Disruption.* Applying the statute and regulation as written will not unsettle expectations or disrupt the dealership industry. *Contra* Pet. Br. 41–45. As a law firm reassured its California automobile dealership clients, a

ruling that service advisors are entitled to overtime should not cause "panic," because "[m]any, if not most, auto dealerships already use commission pay structures for service advisors that comply with . . . Section 207(i)." Navarro *Decision Should Have Little Effect on California Auto Dealers*, SCALI L. FIRM (Mar. 29, 2015), https://perma.cc/ML5W-8T8X.

Industry experts confirm this reassurance. As an automobile-dealership-industry website summarized, "[c]onsidering that most dealerships pay their service advisers using some sort of commission or flat-rate pay plan specifically designed to qualify the service adviser for the [§ 20]7(i) commissioned sales exemption, . . . the *Navarro* decision [below] likely affects very few, if any, employers." John Huetter, *Sky NOT Falling on Overtime for Service Advisers, Auto Body Estimators After* Navarro, REPAIRER DRIVEN NEWS (Apr. 22, 2015), https://perma.cc/DW2C-JMBP.

Thus, applying the overtime-pay requirement to service advisors—just as it applies to automobile dealership sales managers, warranty salesmen, financing salesmen, insurance salesmen, leasing agents, advertisers, Internet marketers, cashiers, receptionists, lot boys, parts runners, car washers, dispatchers, and porters—will not be disruptive.

DoL is in the best position to interpret any possible ambiguities in the FLSA as it applies to the ever-changing automobile dealership industry. As this Court has recognized, "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley*,

517 U.S. at 742. In short, at *Chevron* step two, DoL acted reasonably in repromulgating its consistent regulatory position as a notice-and-comment regulation.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDICES

Appendix A

Fair Labor Standards Amendments of 1966
Pub. L. No. 89–601, § 209, 80 Stat. 830, 836
(codified at 29 U.S.C. § 213(b)(10) (1966))

TITLE II—REVISION OF EXEMPTIONS

* * * * *

Automobile, Aircraft, and Farm Implement Sales Establishments

Sec. 209.

(a) Section 13(a)(19) of such Act is repealed.

(b) Section 13(b) of such Act is amended by inserting after paragraph (9) the following new paragraph in lieu of the paragraph repealed by section 212(a) of this Act:

> "(10) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; or"

Fair Labor Standards Amendments of 1966
Pub. L. No. 89–601, § 602, 80 Stat. 830, 844

TITLE VI—MISCELLANEOUS

* * * * *

Effective Date

Sec. 602.

Except as otherwise provided in this Act, the amendments made by this Act shall take effect on February 1, 1967. On and after the date of the enactment of this Act the Secretary is authorized to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act.

Fair Labor Standards Amendments of 1974
Pub. L. No. 93–259, § 29, 88 Stat. 55, 76

Effective Date

Sec. 29.

(a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.

Appendix B

2008 Notice of Proposed Rulemaking
73 Fed. Reg. 43,654, 43,658–59 (July 28, 2008)

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 4, 531, 553, 778, 779, 780, 785, 786, and 790

RIN 1215-AB13

Updating Regulations Issued Under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Employment Standards Administration, Department of Labor.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: In this proposed rule, the Department of Labor (Department or DOL) proposes to revise regulations issued pursuant to the Fair Labor Standards Act of 1938 (FLSA) and the Portal-to-Portal Act of 1947 (Portal Act) that have become out of date because of subsequent legislation or court decisions. These proposed revisions will conform the regulations to FLSA amendments passed in 1974, 1977, 1996, 1997, 1998, 1999, 2000, and 2007, and Portal Act amendments passed in 1996.

* * * * *

7. *Fair Labor Standards Act Amendments of 1974*

A. Service Advisors Working for Automobile Dealerships and Boat Salespersons

On April 7, 1974, Congress enacted an amendment to section 13(b)(10)(B) of the FLSA, 29 U.S.C. 213(b)(10)(B). Public Law No. 93–259, 88 Stat. 55 (1974). This amendment added an overtime exemption for salespersons primarily engaged in selling boats (in addition to the pre-existing exemption for sellers of trailers or aircraft). This amendment also eliminated the overtime exemption for partsmen and mechanics servicing trailers or aircraft. This proposed rule revises 29 CFR part 779, Subpart D–Exemptions for Certain Retail or Service Establishments, so that the regulations implementing section 13(b)(10)(B) conform to this 1974 amendment. Section 779.371(a) is revised to reflect the amendment's addition of boat salespersons to the exemption. Proposed § 779.372(a) now clarifies that salespersons primarily engaged in selling trailers, boats, or aircraft, but not partsmen or mechanics for such vehicles, are covered by the exemption; portions of § 779.372(b) and (c) also are changed accordingly.

Section 13(b)(10)(A) of the FLSA provides that "any salesman, partsman, or mechanic engaged in selling or servicing automobiles, trucks or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers" shall be exempt from the overtime requirements of the Act. 29 U.S.C. 213(b)(10)(A). The current regulation at 29 CFR 779.372(c)(4) states that an employee described as a service manager, service writer, service advisor, or service salesman, is not exempt under section 13(b)(10)(A).

Uniform appellate and district court decisions, however, hold that service advisors are exempt under

section 13(b)(10)(A) because they are "salesmen" who are primarily engaged in "servicing" automobiles. *See, e.g., Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446, 452 (4th Cir. 2004) (The current regulatory interpretation of this exemption is "an impermissibly restrictive construction of the statute."); *Brennan* v. *Deel Motors, Inc.*, 475 F.2d 1095, 1097 (5th Cir. 1973) (Service advisors are "functionally similar to the mechanics and partsmen who service the automobiles. All three work as an integrated unit, performing the services necessary * * * with the service salesman coordinating these specialties."); *Brennan* v. *North Brothers Ford, Inc.*, 1975 WL 1074 at *3 (E.D. Mich. 1975) (unpublished) ("The spirit of 13(b)(10) is best fulfilled by recognizing the functional similarity of service salesmen to partsmen and mechanics which are both expressly exempted."), *aff'd sub. nom. Dunlop* v. *North Brothers Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (Table).

Based upon the court decisions, the Wage and Hour Division has adopted an enforcement position since 1987 that Wage and Hour "will no longer deny the [overtime] exemption for such employees," and that the regulation would be revised. *See* Wage and Hour Division Field Operations Handbook (FOH) section 24L04(k). Therefore, this proposed rule changes § 779.372(c), entitled "Salesman, partsman, or mechanic," to follow the courts' consistent holdings that employees performing the duties typical of service advisors are within the section 13(b)(10)(A) exemption. Section 779.372(c)(1) is revised to include such an employee as a salesman primarily engaged in servicing automobiles. Section 779.372(c)(4) is rewritten to clarify that such employees qualify for the exemption.

Appendix C

2011 Final Regulation
76 Fed. Reg. 18832, 18837–38 (Apr. 5, 2011)

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 4

Wage and Hour Division

29 CFR Parts 516, 531, 553, 778, 779, 780, 785, 786, and 790

RIN 1215–AB13, 1235–AA00

Updating Regulations Issued Under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Labor (Department or DOL) revises regulations issued pursuant to the Fair Labor Standards Act of 1938 (FLSA) and the Portal-to-Portal Act of 1947 (Portal Act) that have become out of date because of subsequent legislation. These revisions conform the regulations to FLSA amendments passed in 1974, 1977, 1996, 1997, 1998, 1999, 2000, and 2007, and Portal Act amendments passed in 1996.

DATES: *Effective Date*: These rules are effective on May 5, 2011.

* * * * *

7. *Fair Labor Standards Act Amendments of 1974*

A. Service Advisors Working for Automobile Dealerships and Boat Salespersons

On April 7, 1974, Congress enacted an amendment to section 13(b)(10) of the FLSA, 29 U.S.C. 213(b)(10). Public Law 93–259, 88 Stat. 55 (1974). This amendment added an overtime exemption for salespersons primarily engaged in selling boats (in addition to the pre-existing exemption for sellers of trailers or aircraft). This amendment also eliminated the overtime exemption for partsmen and mechanics servicing trailers or aircraft. The proposed rule revised 29 CFR part 779, Subpart D—Exemptions for Certain Retail or Service Establishments—to conform the regulations to this 1974 amendment. Section 779.371(a) was revised to reflect the amendment's addition of boat salespersons to the exemption. Proposed § 779.372(a) clarified that "any salesman, partsman, or mechanic" primarily engaged in selling or servicing automobiles, trucks, or farm implements are covered by the exemption; and that salespersons primarily engaged in selling trailers, boats, or aircraft are also exempt, but not partsmen or mechanics for such vehicles. Portions of § 779.372(b) and (c) were also changed accordingly.

Section 13(b)(10)(A) of the FLSA provides that "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers" shall be exempt from the overtime requirements of the Act. 29 U.S.C. 213(b)(10)(A). The current regulation at 29 CFR

779.372(c)(4) states that an employee described as a service manager, service writer, service advisor, or service salesman who is not primarily engaged in the work of a salesman, partsman, or mechanic is not exempt under section 13(b)(10)(A).

As discussed in the preamble to the proposed rule, three appellate courts have held that service advisors are exempt under section 13(b)(10)(A) because they are "salesmen" who are primarily engaged in servicing automobiles. 73 FR 43658 (Jul. 28, 2008). Based upon the two earliest court decisions, the Wage and Hour Division in 1978 recognized in an Administrator-issued opinion letter that in certain circumstances service advisors or writers "can be properly regarded as engaged in selling activities." *See* Wage and Hour Opinion Letter WH–467, 1978 WL 51403 (July 28, 1978). The opinion letter noted, however, that this "would not be true in the case of warranty work, since the selling of the warranty is done by the vehicle salesman when the vehicle is sold, not by the service writer." Therefore, the NPRM proposed to change § 779.372(c), titled "Salesman, partsman, or mechanic," to follow the courts' holdings that employees performing the duties typical of service advisors are within the section 13(b)(10)(A) exemption. Section 779.372(c)(1) was revised to include such an employee as a salesman primarily engaged in servicing automobiles. Section 779.372(c)(4) was rewritten to clarify that such employees qualify for the exemption.

A number of commenters addressed this issue. The National Automobile Dealers Association stated that the retail automobile and truck dealership

industry has relied upon the Administrator's 1978 opinion letter and that it supported the proposed clarification that such employees are exempt. Littler Mendelson, P.C., similarly stated that it supported the change, because it "will eliminate confusion resulting from the inconsistency between the [Field Operations Handbook] and the current regulatory guidance, and is not a change in the law."

Other commenters disagreed with the proposed rule. The AFL–CIO stated that the proposal ignored congressional intent "to carve a narrow exemption for salesmen who work at automobile dealerships." The AFL–CIO, NELA, and NELP traced the legislative history, focusing on the addition of the requirement that the salesman must be "primarily engaged in selling or servicing such vehicles." These commenters disagreed with the court decisions interpreting the exemption, stating that service advisors merely coordinate between customers and the mechanics who actually perform the services, and that the exemption should not be extended to employees outside its plain language simply because they are "functionally similar" to an exempt employee. The AFL–CIO concluded that "neither integration with exempt employees nor the performance of functions related to those of exempt employees qualifies an employee as one who is *primarily engaged in either selling or servicing vehicles*." (Emphasis in original). NELA concluded that the exemption "requires an employee to either primarily service the vehicle or 'sell' the vehicle—not sell the service of the vehicle, as *Walton* concluded." Comments submitted by Members of the United States Congress similarly opposed the Department's proposal, stating that the

1966 exemption only exempts salesmen who sell automobiles and mechanics who service automobiles, and not salesmen who sell services. They stated that the Department's proposal "would abandon its longstanding and correct interpretation of Section 13(b)(10)," and would ignore the Supreme Court's command to construe FLSA exemptions narrowly. *Id.*

The AFL–CIO stated that, if the Department does treat service writers as salesmen primarily engaged in servicing vehicles, then it urged the Department to exclude any time spent in "selling" warranty work from the determination of whether the writer has spent the majority of his time in selling, since that right to free parts and service has already been sold by the salesman of the vehicle. NELA stated that the proposed regulatory text was confusing because it appears to exempt service writers only if they are selling the servicing of vehicles that the dealership sells, which would be difficult for both the employee and the employer to know. Both NELP and the North Carolina Justice Foundation commented that the proposal exempts service writers based upon their job title alone, rather than based upon an analysis of their actual job duties, which is contrary to the requirement to look at the circumstances of the whole activity.

Upon further consideration of the issue, the Department has decided not to adopt the proposed change to § 779.372(c)(4) to specifically include service managers, service writers, service advisors, or service salesmen as qualifying for exemption. As commenters point out, the statute does not include such positions and the Department recognizes that

there are circumstances under which the requirements for the exemption would not be met. The Department notes that current § 779.372(c)(1) is based on its reading of 13(b)(10)(A) as limiting the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles. The Department believes that this interpretation is reasonable and disagrees with the Fourth Circuit's conclusion in *Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446, 452 (4th Cir. 2004), that the regulation impermissibly narrows the statute. Therefore, the Department has concluded that current 779.372(c) sets forth the appropriate approach to determining whether employees in such positions are subject to the exemption. However, the final rule adopts § 779.372(a)–(b) as proposed.

Appendix D

Federal Statutory Provisions That Are Phrased at Least in Part Distributively (*e.g.*, not all the nouns pair with all the verbs)

Appendix D-1

53 Distributively Phrased Statutes in Which the Number of Words in the First List Does Not Equal the Number of Words in the Second List

49 U.S.C. § 30301(4) — "[M]otor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle operated only on a rail line."

49 U.S.C. § 31301(12) — "[M]otor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle, machine, tractor, trailer, or semitrailer operated only on a rail line or custom harvesting farm machinery."

49 U.S.C. § 13102(16)	"The term 'motor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service."
16 U.S.C. § 742c(e)	"The Secretary is authorized under such terms and conditions and pursuant to regulations prescribed by him to use the funds appropriated under this section to make loans to commercial fishermen for the purpose of chartering fishing vessels pending the *construction* or repair of vessels *lost, destroyed,* or damaged by the earthquake of March 27, 1964, and subsequent tidal waves related thereto ...."
16 U.S.C. § 428i	"or shall *cut down* or *fell* or **remove** any ***timber***, **battle relic**, ***TREE***, or ***TREES GROWING*** or **being** upon such battlefield ...."

16 U.S.C. § 430q	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE*** or ***TREES*** ***GROWING*** or **being** upon said park ...."
16 U.S.C. § 425g	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE*** or ***TREES*** ***GROWING*** or **being** upon said park ...."
16 U.S.C. § 426i	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE***, or ***TREES*** ***GROWING*** or **being** upon such battlefield ...."
16 U.S.C. § 423f	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE*** or ***TREES*** ***GROWING*** or **being** upon said battlefield ...."
16 U.S.C. § 430i	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE***, or ***TREES*** ***GROWING*** or **being** upon said park ..."
16 U.S.C. § 430h	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE***, or ***TREES*** ***GROWING*** or **being** upon said park ...."
43 U.S.C. § 952	"Any *person*, livestock company, or **transportation corporation** engaged in ***breeding***, ***grazing***, ***driving***, *or* ***transport-***

	ing livestock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such livestock, and shall have control of such reservoir ...."
42 U.S.C. § 7384n(c)(4)	"In the case of an atomic weapons employee described in section 7384*l*(3)(B) of this title, the following doses of radiation shall be treated, for purposes of paragraph (3)(A) of this subsection, as part of the radiation dose received by the employee at such facility: (A) Any dose of ionizing radiation received by that employee from *facilities*, ***materials***, ***devices***, or byproducts *used* or generated in the research, development, production, dismantlement, transportation, or testing of nuclear weapons, or from any activities to research, produce, process, store, remediate, or dispose of radioactive materials by or on behalf of the Department of Energy ..."
Burmese Freedom and Democracy Act of 2003,	"The SPDC has demonstrably failed to cooperate with the United States in stopping the flood of *heroin* and metham-

Pub. L. 108-61, § 2(8), 117 Stat. 864	phetamines being *grown*, *refined*, *manufactured*, and *transported* in areas under the control of the SPDC serving to flood the region and much of the world with these illicit drugs."
22 U.S.C. § 3929(b)	"Inspections, investigations, and audits conducted by or under the direction of the Inspector General shall include the systematic review and evaluation of the administration of activities and operations of Foreign Service posts and bureaus and other operating units of the Department of State, including an examination of-- (1) whether *financial transactions* and accounts are properly *conducted*, *maintained*, and *reported* ...."
42 U.S.C. § 1592e	"The Secretary of Housing and Urban Development may, in his discretion, upon request of the Secretary of Defense or his designee, transfer to the jurisdiction of the Department of Defense without reimbursement any land, *improvements*, *housing*, or *community facilities* *constructed* or acquired under the

provisions of this subchapter and considered by the Department of Defense to be required for the purposes of the said Department."

15 U.S.C. § 272(e)(1) — "In carrying out the activities under subsection (c)(15), the Director-- ... (B) shall not prescribe or otherwise require ... (iii) that information or communications technology *products* or services be *designed*, *developed*, or *manufactured* in a particular manner."

15 U.S.C. § 636(b)(15) — "[The Small Business Administration] may make any loan for *repair*, *rehabilitation*, or *replacement* of property *damaged* or destroyed without regard to whether the required financial assistance is otherwise available from private sources ...."

22 U.S.C. § 2779a(d)(1) — "[T]he term 'offset agreement' means an agreement, arrangement, or understanding between a United States supplier of defense articles or defense services and a foreign country under which the supplier agrees to purchase or acquire, or to promote the purchase or acquisition by other United States

persons of, *goods* or services *produced*, *manufactured*, *grown*, or *extracted*, in whole or in part, in that foreign country in consideration for the purchase by the foreign country of defense articles or defense services from the supplier ...."

31 U.S.C. § 3801(b)(2) "[E]ach claim for property, services, or money is subject to this chapter regardless of whether such *property*, *services*, or *money* is actually *delivered* or paid ...."

12 U.S.C. § 632 "Nothing in this section shall be deemed to repeal or to modify in any manner any of the provisions of the Gold Reserve Act of 1934, as amended, the Silver Purchase Act of 1934, as amended, or subdivision (b) of section 5 of the Act of October 6, 1917, as amended, or any *actions*, REGULATIONS, RULES, ORDERS, or PROCLAMATIONS *taken*, promulgated, made, or ISSUED pursuant to any of such statutes."

5 U.S.C. § 504(a)(2) "A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows

that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any *attorney*, *agent*, or expert witness *representing* or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed."

16 U.S.C. § 572(c) "That when by the terms of a written agreement either party thereto furnishes materials, supplies, equipment, or services for fire emergencies in excess of its proportionate share, adjustment may be made by reimbursement or by replacement in kind of *supplies*, *materials*, and equipment *consumed* or destroyed in excess of the furnishing party's proportionate share."

22 U.S.C. § 8123(b)(2) "A judge of the United States shall promptly issue an administrative search warrant authorizing the requested complementary access upon an affidavit submitted by the United

States Government ... (F) listing the *items*, *documents*, and *areas* to be *searched* and seized ..."

22 U.S.C. § 6725(b)(2) "The judge of the United States shall promptly issue a warrant authorizing the requested inspection upon an affidavit submitted by the United States Government showing that ... (D) the *items*, *documents*, and *areas* to be *searched* and seized ..."

47 U.S.C. § 155(c)(3) "Any *order*, *decision*, *report*, or action *made* or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission."

47 U.S.C. § 155(c)(4) "Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by

the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any *order*, *decision*, *report*, or action *made* or taken pursuant to any delegation under paragraph (1) of this subsection."

47 U.S.C. § 155(c)(7) "The filing of an application for review under this subsection shall be a condition precedent to judicial review of any *order*, *decision*, *report*, or action *made* or taken pursuant to a delegation under paragraph (1) of this subsection."

16 U.S.C. § 916g(a) "Subject to the provisions of the convention, any person authorized to enforce ... the regulations of the Secretary of Commerce may seize, whenever and wherever lawfully found, all *whales* or whale products *taken*, *processed*, or *possessed* contrary to the provisions of the [International Convention for the Regulation of Whaling] ...."

16 U.S.C. § 668b(c)	"That all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this subchapter, be *exercised* or **performed** ...."
16 U.S.C. § 670j(d)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Department of the Treasury shall, for the purposes of this section, be *exercised* or **performed** ...."
16 U.S.C. § 2439(e)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Customs Service may, for the purposes of this chapter, also be *exercised* or **performed** ...."
16 U.S.C. § 3374(b)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department may, for the purposes of this chapter also be *exercised* or **performed** ...."

16 U.S.C. § 2409(e)

"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Customs Service may, for the purposes of this chapter, also be ***exercised*** or **performed** ...."

16 U.S.C. § 742j-1(f)

"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this section, be ***exercised*** or **performed** by the Secretary of the Interior or by such persons as he may designate."

16 U.S.C. § 1540(e)(5)

"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this chapter, be ***exercised*** or **performed** by the Secretary or by such persons as he may designate."

15 U.S.C. § 77jjj(a)(3)

"If the indenture to be qualified requires or permits the appointment of one or more co-trustees in addition to such institutional trustee, the *rights*, powers, **duties**, and OBLIGATIONS

CONFERRED or **IMPOSED** upon the trustees or any of them shall be ***CONFERRED*** or **IMPOSED** upon and ***exercised*** or **PERFORMED** by such institutional trustee, or such institutional trustee and such co-trustees jointly ..."

8 U.S.C. § 1104(a)

"He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the department or independent establishment under whose jurisdiction the employee is serving, any of the *powers*, functions, or **duties** ***conferred*** or **imposed** by this chapter or regulations issued thereunder upon officers or employees of the Department of State or of the American Foreign Service."

50 U.S.C. § 4556(b)

"The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any *right*, liability, or **offense** ***incurred*** or

committed prior to the termination date of such title or of such rule, regulation, or order."

33 U.S.C. § 702i

"The provisions of sections 407, 408, 411, 412, and 413 of this title are made applicable to all *lands*, *waters*, *easements*, and other *property* and *rights acquired* or constructed under the provisions of sections ... of this title."

15 U.S.C. § 13(d)

"It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any *products* or commodities *manufactured*, *sold*, or *offered for sale* by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

23 U.S.C. § 403(c)(1)	"[T]he Secretary is authorized to carry out, on a cost-shared basis, collaborative research and development with ... (A) non-Federal entities, including State and local governments, *colleges*, *universities*, *corporations*, partnerships, sole proprietorships, *organizations*, and *trade associations* that are *incorporated* or established under the laws of any State or the United States ...."
33 U.S.C. § 2313(a)	"For the purpose of improving the state of engineering and construction in the United States and consistent with the civil works mission of the Army Corps of Engineers, the Secretary is authorized to utilize Army Corps of Engineers laboratories and research centers to undertake, on a cost-shared basis, collaborative research and development with non-Federal entities, including State and local government, *colleges* and *universities*, and *corporations*, partnerships, sole proprietorships, and *trade associations* which are *incorporated* or established under the laws of any of the several States of the United States or the District of Columbia."

23 U.S.C. § 502(c)(1)

"To encourage innovative solutions to surface transportation problems and stimulate the deployment of new technology, the Secretary may carry out, on a cost-shared basis, collaborative research and development with-- (A) ... non-Federal entities, including State and local governments, foreign governments, *colleges* and *universities*, *corporations*, *institutions*, partnerships, sole proprietorships, and *trade associations* that are *incorporated* or established under the laws of any State ...."

22 U.S.C. § 2459(b)

"If in any judicial proceeding in any such court any such *process*, judgment, **decree**, or ORDER is ***SOUGHT***, **ISSUED**, or **ENTERED**, the United States attorney for the judicial district within which such proceeding is pending shall be entitled as of right to intervene as a party to that proceeding ...."

18 U.S.C. § 218

"In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind

any *CONTRACT*, *LOAN*, *GRANT*, *SUBSIDY*, *LICENSE*, *RIGHT*, *PERMIT*, *FRANCHISE*, *USE*, AUTHORITY, *PRIVILEGE*, *BENEFIT*, *CERTIFICATE*, *RULING*, *DECISION*, OPINION, or RATE SCHEDULE *awarded*, granted, **paid**, FURNISHED, or published, or the performance of any service or transfer or delivery of any thing to, by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, in relation to which there has been a final conviction for any violation of this chapter, and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended or the thing transferred or delivered on its behalf, or the reasonable value thereof."

15 U.S.C. § 717d(a)

"Whenever the Commission ... shall find that any *rate*, charge, or **classification** *demanded*, *observed*, *charged*, or *collected* by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice,

or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential ...."

16 U.S.C. § 824e(a)

"Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any *rate*, charge, or classification, ***demanded***, ***observed***, *charged*, or *collected* by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential ...."

15 U.S.C. § 2065(a)

"[O]fficers or employees duly designated by the [Consumer Product Safety Commission] ... are authorized-- (1) to enter, at reasonable times, (A) any *factory*, warehouse, or establishment in which consumer products are ***manufactured*** or held, in connection with distribution in commerce ...."

Transfer of Forest Tree Nursery Facilities to States, Pub. L. No. 87-492, § 1, 76 Stat. 107 (1962)	"restoration to the trust fund of an amount equal to the residual value of any *supplies*, *materials*, *equipment*, or *improvements acquired* or constructed with trust funds and transferred to State forestry work other than the soil bank program; that such program under said Soil Bank Act has been discontinued, but the need for the trees continues to be great ..."
42 U.S.C. § 16423(c)(1)	"The term 'qualifying advanced power system technology facility' means a facility using an advanced *fuel cell*, *turbine*, or *hybrid power system* or power storage system to *generate* or store electric energy."
39 U.S.C. § 3001(k)(1)(C)	"the term 'skill contest' means a puzzle, game, competition, or other contest in which-- ... (iii) a *purchase*, *payment*, or donation is *required* or implied to be required to enter the contest ...."
7 U.S.C. § 1627b(f)(2)	"The Board shall ... (B) review any *contract*, *direct loan*, *loan guarantee*, *cooperative agreement*, *equity interest*, *investment*,

repayable grant, and *grant* to be *made* or entered into by the Center and any financial assistance provided to the Center ...."

Appendix D-2

37 Distributively Phrased Statutes in Which the First Word(s) of the First List Pair Only with the First Word(s) of the Second List and the Last Word(s) Pair Only with the Last Word(s)

49 U.S.C. § 30301(4) — "'[M]otor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle operated only on a rail line."

49 U.S.C. § 31301(12) — "'[M]otor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle, machine, tractor, trailer, or semitrailer operated only on a rail line or custom harvesting farm machinery."

49 U.S.C. § 13102(16) — "The term 'motor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle,

locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service."

16 U.S.C. § 742c(e)

"The Secretary is authorized under such terms and conditions and pursuant to regulations prescribed by him to use the funds appropriated under this section to make loans to commercial fishermen for the purpose of chartering fishing vessels pending the *construction* or repair of vessels *lost, destroyed*, or damaged by the earthquake of March 27, 1964, and subsequent tidal waves related thereto ...."

7 U.S.C. § 7470(d)

"On completion of a referendum under subsection (b) of this section, the Secretary shall suspend or terminate the order that was subject to the referendum at the end of the marketing year if-- (1) the suspension or termination of the order is favored by not less than a majority of the producers and importers voting in the referendum; and (2) the *producers* and

importers *produce* and import more than 50 percent of the total volume of kiwifruit *produced* and imported by persons voting in the referendum."

7 U.S.C. § 8401(a)(1)(B) "In determining whether to include an agent or toxin on the list under subparagraph (A), the Secretary shall-- (i) consider ... (III) the availability and effectiveness of *pharmacotherapies* and prophylaxis to *treat* and prevent any illness caused by the agent or toxin ..."

7 U.S.C. § 4611(b)(1) "No order issued under this chapter shall be effective unless the Secretary determines that-- (A) the order is approved by a majority of the producers, importers, and if covered by the order, handlers, voting in the referendum; and (B) the *producers*, importers, and **handlers** comprising the majority *produced*, imported, and **handled** not less than 50 percent of the quantity of the honey and honey products *produced*, imported, and **handled** during the representative period by the persons voting in the referendum."

42 U.S.C. § 300j(c)(1) "Such order shall apply to such manufacturers, producers, processors, distributors, and repackagers of such chemical or substance as the President or his delegate deems necessary and appropriate, except that such order may not apply to any *manufacturer*, producer, or **processor** of such chemical or substance who *manufactures*, produces, or **processes** (as the case may be) such chemical or substance solely for its own use."

42 U.S.C. § 262a(a)(1)(B) "In determining whether to include an agent or toxin on the list under subparagraph (A), the Secretary shall-- (i) consider- - ... (III) the availability and effectiveness of *pharmacotherapies* and immunizations to *treat* and prevent any illness resulting from infection by the agent or toxin ..."

43 U.S.C. § 902 "If at any time prior to the institution of suit by the Attorney General to cancel any *patent* or certification of lands erroneously *patented* or certified a claim or statement is presented

to the Secretary of the Interior by or on behalf of any person or persons ..."

11 U.S.C. § 1502(8) "[A]ny property subject to *attachment* or garnishment that may properly be *seized* or garnished by an action in a Federal or State court in the United States."

7 U.S.C. § 6506(a) "A program established under this chapter shall ... (4) require each certified organic farm or each certified organic handling operation to certify to the Secretary, the governing State official (if applicable), and the certifying agent on an annual basis, that such *farm* or handler has not *produced* or handled any agricultural product sold or labeled as organically produced except in accordance with this chapter ..."

33 U.S.C. § 1504(c)(2) "Each application shall include such financial, technical, and other information as the Secretary deems necessary or appropriate. Such information shall include, but need not be limited to ... (G) the location and capacity of existing and proposed

storage facilities and pipelines which will *store* or transport oil transported through the deepwater port ..."

15 U.S.C. § 636(b)(3)(A)(iii)

"[T]he term 'substantial economic injury' means an economic harm to a business concern that results in the inability of the business concern ... (III) to *market*, produce, or **provide** a product or service ordinarily *marketed*, produced, or **provided** by the business concern."

26 U.S.C. § 834(c)(6)

"In the application of section 1212 for purposes of this section, the net capital loss for the taxable year shall be the amount by which losses for such year from sales or exchanges of capital assets exceeds the sum of the gains from such sales or exchanges and whichever of the following amounts is the lesser: ... or (B) losses from the *sale* or exchange of capital assets *sold* or exchanged to obtain funds to meet abnormal insurance losses and to provide for the payment of dividends and similar distributions to policyholders."

12 U.S.C. § 1717(a)(2)(A) "which shall be in the Department of Housing and Urban Development and which shall retain the *assets* and liabilities *acquired* and incurred under sections 1720 and 1721 of this title prior to such date ..."

12 U.S.C. § 1717(a)(2)(B) "The other such separated portion shall be a body corporate to be known as Federal National Mortgage Association (hereinafter referred to as the "corporation"), which shall retain the *assets* and liabilities *acquired* and incurred under sections 1718 and 1719 ..."

7 U.S.C. § 5822(g)(1)(E) "In the case of any *tenant* or lessee who has *rented* or leased the farm (with or without a written option for annual renewal or periodic renewals) for a period of two or more of the immediately preceding years, the Secretary shall consider the refusal by a landlord, without reasonable cause other than simply for the purpose of enrollment in the program, to renew

such rental or lease as an involuntary displacement in the absence of a written consent to such nonrenewal by the tenant or lessee."

25 U.S.C. § 1633(b)

"For the purpose of implementing the provisions of this subchapter, the Secretary shall assure that the rates of pay for personnel engaged in the *construction* or renovation of facilities *constructed* or renovated in whole or in part by funds made available pursuant to this subchapter are not less than the prevailing local wage rates for similar work as determined in accordance with sections 3141-3144, 3146, and 3147 of Title 40."

10 U.S.C. § 2563(b)

"The Secretary may designate facilities referred to in subsection (a) as the facilities from which *articles* and services *manufactured* or performed by such facilities may be sold under this section."

10 U.S.C. § 2563(a)(2)(A)

"Except as provided in subparagraph (B), articles and services referred to in paragraph (1) are *articles* and services that are

	manufactured or performed by any working-capital funded industrial facility of the armed forces."
10 U.S.C. § 2563(c)(1)	"A sale of articles or services may be made under this section only if ... (C) the *articles* or services can be substantially *manufactured* or performed by the industrial facility concerned with only incidental subcontracting ...."
7 U.S.C. § 1a(18)	"The term 'eligible contract participant' means ... (v) a corporation, partnership, proprietorship, organization, trust, or other entity-- ... (III) that-- ... (bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an *asset* or liability *owned* or incurred or reasonably likely to be *owned* or incurred by the entity in the conduct of the entity's business ...."

10 U.S.C. § 2740(2)	"A case in which-- (A) the *loss* or damage occurred while the *lost* or damaged goods were in the possession of an ocean carrier that was transporting, loading, or unloading the goods under a Department of Defense contract for ocean carriage ..."
10 U.S.C. § 2740(3)(C)	"[A] claim submitted to the delivering transportation service provider or carrier is denied in whole or in part because the *loss* or damage occurred while the *lost* or damaged goods were in the custody of a prior transportation service provider or carrier or government entity."
7 U.S.C. § 950(a)(3)	"[T]he telephone bank shall cease to be an agency of the United States, but shall continue in existence in perpetuity as an instrumentality of the United States and as a banking corporation with all of the *powers* and limitations *conferred* or imposed by this subchapter except such as shall have lapsed pursuant to the provisions of this subchapter."
47 U.S.C. § 326	"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio

communications or signals transmitted by any radio station, and no *regulation* or condition shall be *promulgated* or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

26 U.S.C. § 312(f)(1)(B) "*Gain* or loss so realized shall *increase* or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing taxable income under the law applicable to the year in which such sale or disposition was made."

33 U.S.C. § 1341(a)(4) "[T]he licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the *facility* or activity shall be *operated* or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated."

30 U.S.C. § 625

"Notwithstanding any other provisions of this chapter, all mining claims and mill sites or mineral rights located under the terms of this chapter or otherwise contained on the public lands as described in section 621 of this title shall be used only for the purposes specified in section 621 of this title and no *facility* or activity shall be *erected* or conducted thereon for other purposes."

10 U.S.C. § 1074b(a)(2)

"A member of, and a designated applicant for membership in, the Senior Reserve Officers' Training Corps who incurs or aggravates an injury, illness, or disease-- (A) in the line of duty while performing duties under section 2109 of this title; (B) while *traveling directly to* or from the place at which that member or applicant *is to perform* or has performed duties pursuant to section 2109 of this title ...."

28 U.S.C. § 1453(d)

This section shall not apply to any class action that solely involves-- ... (2) a claim that relates to the internal affairs or governance of a *corporation* or other form of business enterprise and arises under or by virtue of the laws of the State in

which such *corporation* or business enterprise is *incorporated* or organized ...."

28 U.S.C. § 1332(d)(9) "Paragraph (2) shall not apply to any class action that solely involves a claim ... (B) that relates to the internal affairs or governance of a *corporation* or other form of business enterprise and that arises under or by virtue of the laws of the State in which such *corporation* or business enterprise is *incorporated* or organized ...."

42 U.S.C. § 6977(b)(1) "Subject to the provisions of paragraph (2), grants or contracts may be made to pay all or a part of the costs, as may be determined by the Administrator, of any project operated or to be operated by an eligible organization, which is designed ... (B) to train *instructors* and supervisory personnel to *train* or supervise persons in occupations involving the design, operation, and maintenance of solid waste management and resource recovery equipment and facilities."

12 U.S.C.
§ 1821(n)(1)(B)

"Upon the granting of a charter to a bridge depository institution, the bridge depository institution may-- (i) assume such deposits of such insured depository *institution* or institutions that *is* or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate; (ii) assume such other liabilities (including liabilities associated with any trust business) of such insured depository *institution* or institutions that *is* or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate; (iii) purchase such assets (including assets associated with any trust business) of such insured depository *institution* or institutions that *is* or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate ...."

8 U.S.C.
§ 1101(b)(1)(G)(i)(V)

"[I]n the case of a child who has not been adopted-- ... (bb) the prospective adoptive *parent* or parents *has* or have complied with any pre-adoption requirements of the child's proposed residence ...."

5 U.S.C. § 8313(b)

"The prohibition on payment of annuity or retired pay under subsection (a) of this section applies to the period after the end of the 1-year period and continues until-- ... (2) the individual returns and thereafter the *indictment* or charges *is* or are dismissed ...."

Appendix D-3

15 Other Distributively Phrased Statutes

28 U.S.C. § 636(a) — "Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law-- (1) all *powers* and duties *conferred* or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts ..."

48 U.S.C. § 1422c(b) — "All officers shall have such *powers* and *duties* as may be *conferred* or imposed on them by law or by executive regulation of the Governor not inconsistent with any law."

25 U.S.C. § 112 — "The superintendent, agent, or subagent, together with such military officer as the President may direct, shall be present,

	and certify to the delivery of all *goods* and money required to be paid or *delivered* to the Indians."
15 U.S.C. § 69g(a)(1)	"Any fur product or fur shall be liable to be proceeded against in the district court of the United States for the district in which found, and to be seized for confiscation by process of libel for condemnation, if the Commission has reasonable cause to believe such *fur product* or fur is being *manufactured* or *held for shipment*, or *shipped*, or *held for sale or exchange* after shipment, in commerce, in violation of the provisions of this subchapter ..."
46 U.S.C. § 3302(c)(3)(C)	"In this paragraph, the term 'proprietary cargo' means cargo that ... (iii) consists of *fish* or fish products *harvested* or *processed* by the owner of the vessel or any affiliated entity or subsidiary."
42 U.S.C. § 3611(a)	"The Secretary may, in accordance with this subsection, issue subpoenas and order discovery in aid of investigations and

hearings under this subchapter. Such subpoenas and discovery may be ordered to the same extent and subject to the same limitations as would apply if the *subpoenas* or discovery were ordered or *served* in aid of a civil action in the United States district court for the district in which the investigation is taking place."

23 U.S.C. § 109(l)(2)(A) "[T]he term 'utility facility' means any privately, publicly, or cooperatively owned *line*, facility, or system for **producing**, ***transmitting***, or ***distributing*** communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public ...."

19 U.S.C. § 81r(c) "The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Board and it shall thereupon file in the court the record in the pro-

ceedings held before it under this section, as provided in section 2112 of Title 28. The *testimony* and evidence *taken* or *submitted* before the Board, duly certified and filed as a part of the record, shall be considered by the court as the evidence in the case."

7 U.S.C. § 8(b)

"The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Commission and file in the court the record in such proceedings, as provided in section 2112 of Title 28. The *testimony* and evidence *taken* or *submitted* before the Commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. Such a court may affirm or set aside the order of the Commission or may direct it to modify its order."

54 U.S.C. § 101118(a)

"The National Park Foundation and any *income* or property *received* or owned by it, and all transactions relating to that

income or property, shall be exempt from all Federal, State, and local taxation."

16 U.S.C. § 583j-2(e)(3) — "The Foundation and any *income* or property *received* or owned by it, and all transactions relating to such income or property, shall be exempt from all Federal, State, and local taxation with respect thereto."

22 U.S.C. § 2124c(j) — "The Foundation and any *income* or property *received* or owned by it, and all transactions relating to such income or property, shall be exempt from all Federal, State, and local taxation with respect thereto."

16 U.S.C. § 916c(a) — "It shall be unlawful for any person ... (2) to ship, transport, purchase, sell, offer for sale, import, export, or have in possession any whale or *whale products* taken or *processed* in violation of the [International Convention for the Regulation of Whaling], or of any regulation of the Commission, or of this subchapter, or of any regulation of the Secretary of Commerce ...."

20 U.S.C. § 1067j(b)

"The Secretary shall establish procedures for reviewing and evaluating *grants* and contracts *made* or entered into under such programs. Procedures for reviewing grant applications, based on the peer review system, or contracts for financial assistance under this subchapter may not be subject to any review outside of officials responsible for the administration of the Minority Science and Engineering Improvement Programs."

12 U.S.C. § 1735e-1

"In the administration of housing assistance programs, the Secretary of Housing and Urban Development shall encourage the use of *materials* and products *mined* and *produced* in the United States."

Appendix E

BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, BULL. NO. 1450, at 310, 315, 313, 477 (1966–67 ed.)

Automobile salesman and new customer review sales contract.

Service advisor records customer's maintenance needs.

Automobile parts counterman dispenses part to mechanic.

Automobile mechanic uses testing equipment to tune engine.